Supreme Court, U.S.
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77 No. ____

In The
Supreme Court of the United States

CAMDEN-CLARK MEMORIAL HOSPITAL CORPORATION,

Petitioner,

v.

BERNARD BOGGS, as Administrator of the Estate of HILDA BOGGS, deceased, as Personal Representative of the statutory beneficiaries of a wrongful death claim, and in his own right,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment guarantees a civil litigant the procedural right to *de novo* appellate review, applying the *Gore* guideposts, of the constitutionality of an assessment of punitive damages against that litigant.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Camden-Clark Memorial Hospital Corporation was the petitioner in the Supreme Court of Appeals of West Virginia and is the petitioner in this Court. Camden-Clark Memorial Hospital Corporation is a wholly owned subsidiary of Camden-Clark Health Services, Inc. No publicly held corporation owns 10% or more of the stock of either Camden-Clark Memorial Hospital Corporation or Camden-Clark Health Services, Inc.

The respondent in the Supreme Court of Appeals of West Virginia was Bernard Boggs, as administrator of the estate of Hilda Boggs, deceased, as personal representative of the statutory beneficiaries of a wrongful death claim, and in his own right.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Camden-Clark Memorial Hospital Corporation ("Camden-Clark") respectfully petitions for a writ of certiorari to review the order of the Supreme Court of Appeals of West Virginia refusing Camden-Clark's petitions for appeal in this case.

OPINIONS BELOW

The Supreme Court of Appeals of West Virginia refused Camden-Clark's petitions for appeal in unpublished orders (App. 1a, 3a). The Supreme Court of Appeals further denied Camden-Clark's motion for leave to renew its petitions out of time in an unpublished order (App. 5a).

JURISDICTION

On September 20, 2007, the Supreme Court of Appeals entered orders refusing Camden-Clark's petitions for appeal (App. 1a, 3a). On November 7, 2007, the Supreme Court of Appeals denied Camden-Clark's motion for leave to renew its petitions out of time (App. 5a). This rejection of Camden-Clark's petitions left in place a final judgment against Camden-Clark that was rendered by the Circuit Court of Wood County, West Virginia, on April 28, 2006 (App. 7a), and an order denying Camden-Clark's post-trial motions, which order was entered on October 26, 2006.

Title 28 U.S.C. § 1257(a) confers jurisdiction upon this Court to review the order refusing Camden-Clark's petitions for appeal. Because this

Petition involves the constitutionality of the State of West Virginia's appellate procedures, 28 U.S.C. § 2403(b) may apply. Camden-Clark has therefore served this Petition on the Attorney General of West Virginia in accordance with Supreme Court Rule 29.4(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states, in pertinent part, that "[n]o State shall ... deprive any person of ... property without due process of law..."

Section 58-5-1 of the West Virginia Code states, in pertinent part, that "[a] party to a civil action may appeal to the supreme court of appeals from a final judgment of any circuit court ... ."

Section 58-5-3 states, in pertinent part, that "[a] party desiring to appeal ... may file a petition in accordance with rules of appellate procedure promulgated by the supreme court of appeals."

Rule 7 of the West Virginia Rules of Appellate Procedure states, in pertinent part:

> (a) Rejection. If the petition for appeal is rejected by the Supreme Court on the ground that the judgment or order is plainly right, no other petition for appeal from that judgment or order shall be permitted. If the petition for appeal is rejected on any other ground,

or if no ground be cited in the rejection, the petitioner may renew the petition as many times as he desires during the period prescribed by law for presentation of petitions.

...

(c) Allowance. If the petition for appeal is granted:

(1) The Clerk of the Supreme Court shall docket the same and immediately send a copy of the order granting the appeal to the petitioner's counsel, or, if there is no counsel of record, to the petitioner, and to the clerk of the circuit court, who shall retain the same in his records.

(2) The Clerk of the Supreme Court shall forthwith return the record, unless the entire record had been transmitted, to the clerk of the circuit court for preparation of the record of the case for appeal in accordance with Rules 8 and 9.

(3) The Clerk of the Supreme Court shall then send a copy of the order to all parties appearing of record, other than the petitioner, that they may be heard, and shall also issue any supersedeas which may have been awarded. The Clerk of the Supreme

> Court shall serve the order upon the parties by mailing the same to the counsel of record for each party, or if there is no counsel of record, to the party at his last known address. Service shall be complete upon mailing. The Clerk of the Supreme Court shall note upon the docket the names of the parties to whom the orders were mailed, with the date of mailing.
>
> (4) The Court may grant a supersedeas or modify the conditions thereof, in accordance with Rule 6.

STATEMENT OF THE CASE

This petition arises from the Supreme Court of Appeals of West Virginia's failure to recognize its constitutional obligation to provide *de novo* appellate review of awards of punitive damages. This failure places the Supreme Court of Appeals squarely at odds with this Court's decisions, and it denies litigants such as Camden-Clark the minimum procedural due process protections required by the Fourteenth Amendment.

This case began as a medical malpractice action in the Circuit Court of Wood County, West Virginia. On September 28, 2001, Mrs. Hilda Boggs, a fifty-year-old school teacher, fell at work and broke her left ankle. She sought treatment later that day at Camden-Clark, a not-for-profit community hospital located in Parkersburg, West Virginia. Her attending physicians determined that she needed

surgery to reduce and repair the ankle, and she was admitted as an inpatient.

Pre-operative testing raised serious concerns about Mrs. Boggs' ability to tolerate the planned surgical procedure. A cardiologist recommended that she not be given general anesthesia, but instead that she be anesthetized only regionally. The cardiologist described Mrs. Boggs as "at risk" for surgery, but in his view the risk was an "acceptable" one.

Surgery was attempted on the evening of September 29. An anesthesiologist and certified registered nurse anesthetist were present to provide the regional anesthesia. Neither was an employee or actual agent of Camden-Clark.

As the surgeon and other necessary personnel prepared for the surgery, the anesthesiologist administered a spinal anesthetic. Within a few moments, Mrs. Boggs stopped breathing. A circulating nurse first observed that Mrs. Boggs' complexion had become "dusky," and she quickly alerted those on hand.

Mrs. Boggs was in cardiac and respiratory arrest. Emergency resuscitation efforts began immediately, and those efforts restored both heartbeat and breathing within minutes. But Mrs. Boggs had already suffered irreversible brain damage, and she never woke up. She died six days later.

Bernard Boggs, husband of the deceased and administrator of her estate, brought suit against the anesthesiologist, his practice group, and Camden-Clark. Mr. Boggs alleged theories of medical negligence, outrage, and fraudulent concealment. The anesthesiologist and his group settled Plaintiff's claims against them before trial for $2 million.

After a trial, judgment was entered against the Hospital in the principal amount of $4,834,380. Of that sum, $3 million represented an award of punitive damages against the Hospital.[1]

On October 26, 2006, Camden-Clark timely petitioned the Supreme Court of Appeals of West Virginia for appeal. In its petition (App. 24a), Camden-Clark assigned fifteen reversible errors, five of which involved the punitive damages award, including contentions that the award violated its rights to both procedural and substantive due process. (App. 134a-145a). Camden-Clark also expressly pointed out that the Supreme Court of Appeals was obligated to grant the petition for appeal and conduct a *de novo* appellate review of the

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[1] Though it is not pertinent to the question presented, Camden-Clark should also point out that an additional $1.5 million of the total judgment represented a purported punitive damages "award" against the anesthesiologist (who was no longer a defendant) and nurse anesthetist (who had never been a defendant). The Circuit Court purported to "offset" this "award" with $1.5 million of the $2 million pretrial settlement by the anesthesiologist and his group. Because this offset had the effect of depriving Camden-Clark of credit against its own liability for the full value of the settlement, it essentially required Camden-Clark to pay an additional $1.5 million in punitive damages.

constitutionality of the punitive damages award applying the "guideposts" announced by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) ("*Gore*"). (App. 86a-88a). Camden-Clark therefore properly raised and preserved the question presented in the instant petition. A second, substantively identical, petition was timely filed on February 23, 2007. (App. 147a).[2]

In a two-sentence order (one of which merely noted that two of the five Justices dissented), the Supreme Court of Appeals summarily refused Camden-Clark's petitions. On October 3, 2007, Camden-Clark moved for leave to renew its petitions out of time. (App. 271a). In that motion, Camden-Clark reiterated its procedural entitlement to exacting, *de novo* review of the constitutionality of the punitive damages award. (App. 277a-279a). In another two-sentence order (with one Justice dissenting), the Supreme Court of Appeals denied this motion on November 7, 2007. (App. 5a).

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[2] Camden-Clark filed this second petition following the Circuit Court of Wood County's denial of its post-trial motions. Because of a discrepancy between the date of entry shown on the judgment order and the date upon which the clerk of the Circuit Court actually noted the judgment in the civil docket (defined as "entry" by W. Va. R. Civ. P. 58), Respondent Boggs had challenged the timeliness of those motions, and Camden-Clark filed its second petition to preserve its rights to argue otherwise. The point is academic here, inasmuch as Camden-Clark's October 26, 2006, petition was indisputably timely, and it raised, at the first possible opportunity, Camden-Clark's entitlement to *de novo* appellate review of the constitutionality of the punitive damages award.

REASONS FOR ALLOWANCE OF THE WRIT

In Camden-Clark's view, this Court has already decided the question presented by this petition, and the Supreme Court of Appeals of West Virginia has simply failed to heed this Court's rulings. A remedy by certiorari will assure that Camden-Clark's rights are honored here, and will further assure that all West Virginia litigants will receive constitutionally adequate procedural protection in the future.

This Court has provided clear guidance to appellate courts that are called upon to review the constitutionality of a punitive damages award under the Fourteenth Amendment. Specifically, this Court has "mandated appellate courts to conduct *de novo* review" of any award using the three *Gore* guideposts. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). The Court has been similarly explicit about the reason for this mandatory directive: "[e]xacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" *Id.* (quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001)) (internal quotations omitted).

Camden-Clark expressly sought this "exacting" appellate review, but the Supreme Court of Appeals of West Virginia refused to provide it. Instead, it issued this terse rejection: "Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal." Camden-Clark respectfully submits that this

summary dismissal – which by state law is not even a decision on the merits – falls woefully short of the exacting, *de novo* appellate review mandated by this Court.

Camden-Clark is not the only litigant that has been denied such review in West Virginia. West Virginia litigants therefore face a danger of arbitrary deprivation of property not posed by the laws of any other state.

I. Due Process Requires the Supreme Court of Appeals of West Virginia to Conduct *De Novo* Review of the Constitutionality of the Punitive Damages Awarded Against Camden-Clark.

This Court has repeatedly stressed that vigorous appellate review is a core component of the process due a civil litigant that faces a punitive damages award. The Court has also often explained the reasons for this rule. Careful appellate scrutiny of punitive damages is essential because "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). Moreover, "[a]lthough these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." *State Farm*, 538 U.S. at 417. In light of this "acute danger" of arbitrary results and the lack of concrete, well-established protections such as are available to a criminal defendant, detailed appellate review of punitive damages has served as a cornerstone of the

procedural rights that this Court has recognized in a string of pertinent decisions.

The first of these was *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). At issue there was the constitutional adequacy of the procedures used by the State of Alabama in punitive damages cases. This Court first reflected on the "traditional common-law approach," under which the jury fixes the amount of the "punitive award," which is in turn "reviewed by trial and appellate courts to ensure that it is reasonable." 499 U.S. at 15. Finding common-law tradition to be a useful reference point, this Court then examined Alabama's approach and found it to be constitutionally satisfactory. In particular, this Court was impressed by the Alabama Supreme Court's practice of providing thorough appellate review of punitive awards, which review involved the application of "detailed substantive standards" and "provide[d] an additional check on the jury's or trial court's discretion." *Id.* at 20-21. This Court explained that such careful "*appellate* review *makes certain* that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Id.* at 21 (emphasis added).

This Court's next examination of due process safeguards for punitive awards occurred in a case from West Virginia. Among the issues raised in *TXO Production Corp. v. Alliance Resources Corp.* was whether the punitive damages award in question "violate[d] the Due Process Clause of the

Fourteenth Amendment ... because it [was] the product of an unfair procedure." 509 U.S. 443, 446 (1993). In that regard, the petitioner argued in part that the jury's award "was not adequately reviewed by ... the appellate court." *Id.* at 462-63. This Court disagreed, and commended the Supreme Court of Appeals for "the reasoning in its thorough opinion," which "was unanimous and gave careful attention to the relevant precedents." *Id.* at 465.

Honda Motor Co. v. Oberg moved beyond merely approving the adequacy of a review that had actually been undertaken by a state appellate court. In *Oberg*, this Court expressly held that such review is required: "denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment." 512 U.S. 415, 432. In so holding, this Court reviewed its opinions in *Haslip* and *TXO*, recognizing that both opinions "strongly emphasized the importance of the procedural component of the Due Process Clause" as applied to punitive damages awards. *Id.* at 420. This Court noted that *Haslip* had "stressed the availability of both 'meaningful and adequate review by the trial court' *and subsequent appellate review*." *Id.* (quoting *Haslip*, 499 U.S. at 20) (emphasis added). "Similarly, in *TXO*, the plurality opinion found that the fact that the 'award was reviewed and upheld by the trial judge' *and unanimously affirmed on appeal* gave rise 'to a strong presumption of validity.'" *Id.* at 420-21 (quoting *TXO*, 509 U.S. at 457) (emphasis added). In light of traditional, common-law emphasis on the necessity of judicial

review of punitive damages, this Court ruled that Oregon's denial of judicial review violated due process.[3] *Id.* at 432.

In *Gore*, of course, this Court recognized that due process assures litigants facing claims for punitive damages not merely a fair procedure, but a fair substantive result. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. To help achieve that end, the Court established a set of three guideposts for trial and appellate courts to use when

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[3] Commentators have observed that *Oberg* itself requires appellate review of punitive damages awards. See, e.g., Stephen C. Yeazell, *Punitive Damages, Descriptive Statistics, and the Economy of Civil Litigation*, 79 NOTRE DAME L. REV. 2025, 2027 (2004) ("in a genuinely procedural ruling, [the Court] held that appellate review of punitive damages awards was required" (citing *Oberg* at 434-35)); Leonard E. Gross, *Time and Tide Wait for No Man: Should Lost Personal Time Be Compensable?*, 33 RUTGERS L.J. 683, 705 (2002) ("The United States Supreme Court has required that there be appellate review of the size of punitive damages awards." (citing *Oberg*)); Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1347 (1996) ("Even so, the Court appears to have required ... at least a minimum of appellate *process* and scrutiny... Its 1994 decision in *Honda Motor Co., Ltd. v. Oberg* held that the Fourteenth Amendment at least requires appellate scrutiny beyond *no evidence* review, striking down the Oregon process of insulating awards absent such a finding." (emphasis in original)).

although trial courts may have a slight advantage over appellate courts in applying the first *Gore* guidepost, both are equally capable of applying the second, and appellate courts likely possess superior expertise as regards the third. *Id.* These considerations helped lead this Court to reject deferential appellate review in favor of exacting, independent examination by appellate courts.

Cooper Industries was before the Court on certiorari from a United States Court of Appeals. But if any conceivable doubt remained thereafter that its holding applied with equal force to the states, that doubt was dispelled in *State Farm*.[5] On certiorari to the Supreme Court of Utah, this Court explained that *Cooper Industries* "mandated *appellate courts* to conduct *de novo* review" of the *Gore* guideposts because "[e]xacting appellate review ensures that an award of punitive damages is based

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[5] In the words of one commentator:

> Exacting appellate review, the Court explained [in *Cooper Industries*], is both necessary and compulsory, at least in federal courts, to ensure that a punitive damages award is based on an "application of law, rather than a decisionmaker's caprice." Although *Cooper* concerned only federal court appellate review, *State Farm* makes clear that the Court believes that state appellate courts, too, must exercise *de novo* review over whether punitive damages are excessive.

Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN L. REV. 1049, 1069-70 (2004).

upon an 'application of law, rather than a decisionmaker's caprice.'" *State Farm*, 538 U.S. at 418 (2003) (quoting *Cooper Industries*, 532 U.S. at 436 (2001)) (emphasis added; internal quotations omitted); see also *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062 (2007) (citing *Oberg* as "requiring judicial review of the size of punitive awards" and citing *Cooper Industries* as mandating that "review must be *de novo*").

After "mandating ... [e]xacting appellate review," this Court remanded *State Farm* to the Supreme Court of Utah for proper application of this Court's precedents. *Id.* at 428. The constitutional duties of the Supreme Court of Appeals of West Virginia cannot be less demanding than the constitutional duties of the Supreme Court of Utah. Hence, this Court should clearly grant the writ and remand this case to the Supreme Court of Appeals of West Virginia for *de novo* appellate review and analysis under the *Gore* framework.

II. Petitioner Does Not Stand Alone; the Supreme Court of Appeals of West Virginia Often Refuses to Conduct *De Novo* Appellate Review of the Constitutionality of Punitive Damages Awards.

West Virginia provides no litigant an appeal as of right. It has no intermediate appellate court, and the Supreme Court of Appeals may grant or refuse a petition for appeal in its sole discretion. Given the nature of this process, the refusal of a

petition carries absolutely no implication regarding the Court's view of the merits of the case. Accordingly, the West Virginia Court's summary refusal of an appeal necessarily fails to satisfy the minimum requirements of due process – *i.e.* a *de novo* appellate review applying the *Gore* guideposts.

Shortly after this Court's decision in *Haslip*, the Supreme Court of Appeals of West Virginia decided *Carnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1992). In *Garnes*, the Supreme Court of Appeals prescribed a set of factors – fashioned closely after the Alabama standards approved by this Court in *Haslip* – for juries and trial courts to use when considering an award of punitive damages. Syl. pt. 3, *id.* The *Garnes* court also directed West Virginia trial courts to conduct post-verdict review of a punitive award. Syl. pt. 4, *id.* Finally, the Supreme Court of Appeals recognized that it, too, must review such awards. Syl. pt. 2, *id.* ("Under our system for an award and review of punitive damages awards, there must be ... appellate review."); see also *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 490 S.E.2d 678, 685 (1997) ("Through [*Garnes*] we imposed the necessary, but previously lacking, requirement of a 'meaningful and adequate review' by both the trial and appellate court systems..." (quoting Syl. pt. 2, *Garnes*)).

The promise of proper appellate review in *Garnes* was dashed, however, just as soon as it was announced. How? Because the *Garnes* Court also held that it could satisfy its obligation to conduct a

"meaningful and adequate" appellate review of a punitive damages award by merely considering (and accepting or rejecting) a *petition* for appeal. *Id.*; *see also* syl. pt. 5, *id.* (Court will review punitive damages awards "upon petition"). True to its word, the Supreme Court of Appeals often denies petitions for review of punitive damages awards summarily.[6] This practice is constitutionally deficient.

A meaningful and adequate appellate review – an "exacting," *de novo* review – must surely be one that *at least* turns upon the merits. Yet it is a matter of settled West Virginia law that the Supreme Court of Appeals' refusal of a petition for appeal does not reflect *any* consideration of the merits of the petition: "We note that our denial of appeal ... which cite[s] no ground for rejection, is similar to the denial of certiorari by the U.S. Supreme Court in that the denial of appeal is *not an adjudication on the merits* and *does not carry any implication of approval* of the judgment sought to be

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[6] The appendix contains a sampling of summary orders that have been entered by the Supreme Court of Appeals denying petitions for appeal of punitive damages awards. Accompanying each order is a copy of the rejected petition. (App. 281a-476a) (containing *Willis v. Pate*, No. 050244 (W. Va. 2005); *Fitch v. Mountain Enterprises, Inc.*, No. 031470 (W. Va. 2003), *cert. denied*, 541 U.S. 989 (2004); and *Kocher v. Oxford Life Insurance Co.*, No. 031539 (W. Va. 2003))). In *Kocher*, the Supreme Court of Appeals declined to grant an appeal as regards the constitutionality of a *$34 million* punitive damages award, although it did later vacate that award on a state procedural ground. *Kocher v. Oxford Life Ins. Co.*, 216 W. Va. 56, 602 S.E.2d 499, 503-04 (2004).

reviewed." *Triggs v. Berkeley County Bd. of Educ.*, 188 W. Va. 435, 425 S.E.2d 111, 118 n.9 (1992) (emphasis added); *see also* Syllabus, *Smith v. Hedrick*, 181 W. Va. 394, 382 S.E.2d 588 (1989) ("This Court's rejection of a petition for appeal *is not a decision on the merits* precluding all future consideration of the issues raised therein, unless, as stated in Rule 7 of the West Virginia Rules of Appellate Procedure, such petition is rejected because the lower court's judgment or order is plainly right, in which case no other petition for appeal shall be permitted." (emphasis added)); *In re Nat'l Bank of Wheeling*, 137 W. Va. 673, 73 S.E.2d 655, 667 (1952) ("As has often been pointed out by the Courts, the refusal of a Court to grant a writ of error in no manner indicates the view of the Court on any question involving the merits of the case.") (*overruled in part on other grounds*, *In re Kanawha Valley Bank*, 144 W. Va. 346, 109 S.E.2d 649 (1959)); *see also Blackburn v. State of West Virginia*, 170 W. Va. 96, 290 S.E.2d 22, 27 (1982) ("[R]efusal to docket an application for appeal from the judgment of an inferior court is not a final judgment having *res judicata* effect unless the appellate court's rejection of the application for appeal specifically addresses the issues raised by the applicant and finds that the lower court's judgment is plainly right.").

Accordingly, the only effect of the Supreme Court of Appeals' refusal of Camden-Clark's petition is to let the judgment of the Circuit Court stand unmolested, unapproved, and unreviewed. The two-sentence order neither is nor purports to be a

decision on the merits. At the very most, the denial of the petition demonstrates deference to the trial court's judgment, and deference is the antithesis of *de novo* review. As this Court has observed, "[w]hen *de novo* review is compelled, no form of appellate deference is acceptable." *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991).

But even if the Supreme Court of Appeals' unexplained, summary disposal of Camden-Clark's petition were deemed to be on the merits under state law – and again it is not – it surely would not constitute the exacting, *de novo* review required by the Fourteenth Amendment. In *Salve Regina*, for example, this Court explained how such review ensures against error: "Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions." 499 U.S. at 232 (quoting *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 458-59 (1959) (Frankfurter, J., dissenting)). Thus, at a minimum, *de novo* review must entail a full and fresh look at the record and – even if affirmance is called for – some articulated reason or reasons for the appellate court's decision. Camden-Clark does not suggest that Justice Frankfurter's ideal of a "learned and impressive opinion[]" is the constitutional minimum in every punitive damages case. But the Supreme Court of Appeals' unopinionated "opinion" – "[u]pon

consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal" – is surely not enough.

Exercising the sovereign power of the State of West Virginia, a jury has punished Camden-Clark severely. After asking the highest court of that State to provide an exacting and *de novo* review of its seven-figure punishment, Camden-Clark was rebuffed in one terse sentence. Whether or not the Supreme Court of Appeals considers that sentence a "meaningful and adequate" review, Camden-Clark respectfully submits that it is actually no more than "a caricature of the difficult task of determining whether an award may be upheld consistent with due process." *TXO*, 509 U.S. at 498 (O'Connor, J., dissenting).

III. The Question Presented Warrants This Court's Attention and Intervention.

Camden-Clark can neither contend nor pretend that a grant of certiorari in this case will have nationwide impact. It will not. Its impact will be felt in West Virginia, and perhaps no further. But the Fourteenth Amendment unites all of the United States, and a West Virginia litigant is entitled to the same due process of law as any litigant anywhere in the land.

As regards punitive damages, West Virginia's wholly discretionary, non-merits appeals process poses a greater risk of arbitrary deprivation of property than that found in any other State. Forty-

eight States offer at least one appeal as of right in civil litigation, to either an intermediate appellate court or to the State highest court.[7] A forty-ninth, Virginia, also provides only discretionary appeals in most civil cases. Nonetheless, Virginia provides some protections from arbitrary punitive awards not found in West Virginia. For one thing, the Supreme Court of Virginia at least considers its review of a petition for appeal to be a decision *on the merits*. See *Sheets v. Castle*, 263 Va. 407, 559 S.E.2d 616, 619 (2002) ("the refusal of a petition for appeal constitutes a decision on the merits"); *Saunders v. Reynolds*, 214 Va. 697, 204 S.E.2d 421, 424 (1974) ("[w]e state unequivocally that a decision to grant or refuse a petition for writ of error is based upon one

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[7] Note, *Expanding the Due Process Rights of Indigent Litigants: Will* Texaco *Trickle Down?*, 61 N.Y.U. L. REV. 463, 467 (1986) ("Today, appeal as of right in both civil and criminal cases is the rule in federal court and in the courts of all states except New Hampshire, Virginia, and West Virginia."); see also Robert L. Stern, APPELLATE PRACTICE IN THE UNITED STATES 7, 13-16 (2d ed. 1989). Stern states that "New Hampshire and West Virginia seem to be the only American jurisdictions in which the decisions of trial courts of general jurisdiction are not subject to review as of right," but, as is noted in the text above, Virginia also provides only discretionary review in most civil cases. Until recently, New Hampshire also offered only discretionary appeals. *Id.* In 2004, however, New Hampshire amended its rules to provide for a "mandatory appeal" as of right from a "final decision on the merits" issued by a trial court, with a few very limited exceptions. See N.H. S. Ct. R. 3, 7; see also *Bean v. Red Oak Prop. Mgmt.*, 151 N.H. 248, 855 A.2d 564, 565 (2004) ("Under our new appellate rules, which took effect on January 1, 2004, the plaintiff's appeal is a 'mandatory' appeal. A timely-filed mandatory appeal is automatically accepted by the court for review on the merits.").

equally-applied criterion – the merits of the case").[8] In addition, Virginia has a statutory limit of $350,000 on punitive damages, which by itself provides significant protection against runaway punitive awards. Va. Code § 8.01-38.1. West Virginia has no such statute.

Moreover, other state courts have taken this Court's guidance to heart and are providing *de novo* appellate review in accord with *Cooper Industries* and *State Farm*. See, e.g., *Simon v. San Paolo U.S. Holding Co.*, 35 Cal. 4th 1159, 113 P.3d 63, 70 n.2 (2005) ("The requirement of independent review applies to state as well as federal appellate courts when assessing excessiveness under the federal due process clause."); *Daka, Inc. v. McCrae*, 839 A.2d 682, 697 (D.C. 2003) ("[A]ppellate courts must 'conduct *de novo* review of a trial court's application of the guideposts to the jury award." (quoting *State Farm*, 538 U.S. at 418)); *Stroud v. Lints*, 790 N.E.2d 440, 442 (Ind. 2003) ("It is clear that a state is required, as a matter of federal constitutional law, to provide appellate review of the amount of a punitive damages award. ... *State Farm* reaffirmed that an appellate court is required to review *de novo* a trial court's ruling on a due process challenge to a punitive award."); *Time Warner Entm't Co. v. Six Flags Over Georgia*, 254 Ga. App. 598, 563 S.E.2d

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[8] In Petitioner's view, any summary, unexplained review of a punitive damages award conflicts with this Court's due process holdings, however the state court characterizes the review, but of course the Court need not address that question today. It is enough to note that any purported review of the merits of the case surpasses the legally meaningless refusal of a petition for appeal in West Virginia.

178, 180-81 (2002) ("*Leatherman* requires state and federal appellate courts to review *de novo* claims that punitive damages awards are grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.").[9]

West Virginia must not be permitted to alone defy this Court's precedent. After all, "the uniform general treatment of similarly situated persons ... is the essence of law itself." *Gore*, 517 U.S. at 587 (Breyer, J., concurring). Civil litigants who are punished by West Virginia juries are being treated differently, unfairly, and unconstitutionally because they are not guaranteed the exacting appellate review prescribed by this Court. This Court must restore that guarantee.

CONCLUSION

This petition for a writ of certiorari should be granted so that this Court may address the Supreme Court of Appeals of West Virginia's failure to provide the *de novo* appellate review of the constitutionality of punitive damages awards required under the Due Process Clause of the Fourteenth Amendment.

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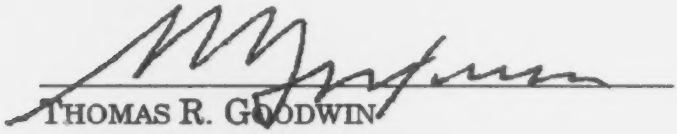
[9] Indeed, in the event that it grants a petition for appeal, the Supreme Court of Appeals has itself acknowledged – at least in passing – its obligation to conduct *de novo* review. *Boyd v. Goffoli*, 216 W. Va. 552, 608 S.E.2d 169, 176-77 (2004) ("As a preliminary matter, we note that our review of [the propriety of a punitive award] is *de novo*." (citing *Cooper Industries*)). It apparently fails to recognize, however, that its obligation is just that – an obligation – and not one that it assumes only when it decides to assume it.

Respectfully submitted,

Camden-Clark Memorial
Hospital Corporation,

By counsel,



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APPENDIX

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 20th of September, 2007, the following order was made and entered:

Bernard Boggs, as Administrator of the Estate of Hilda Boggs, deceased, as personal representative of the statutory beneficiaries of the wrongful death claim herein asserted and in his own right, Plaintiff Below, Respondent

vs.) No. 070578

Camden-Clark Memorial Hospital Corporation, Defendant Below, Petitioner

On a former day, to-wit, February 27, 2007, came the petitioner, Camden-Clark Memorial Hospital Corp., by Thomas R. Goodwin, Johnny M. Knisely II and W. Jeffrey Vollmer, Goodwin & Goodwin, LLP, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Wood County, rendered on the 28th day of April, 2006, with the record accompanying the petition. Thereafter, on the 2nd day of March, 2007, came the respondent, Bernard R. Boggs, by Christopher J. Regan, Bordas & Bordas, PLLC; and Christopher A. Rinehart, Carlile Patchen & Murphy, LLP, his attorneys, and presented to the Court his written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justices Maynard and Benjamin would grant.

A True Copy

Attest: /s/Rory L. Perry
Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 20th of September, 2007, the following order was made and entered:

Bernard Boggs, as Administrator of the Estate of Hilda Boggs, deceased, as personal representative of the statutory beneficiaries of the wrongful death claim herein asserted and in his own right, Plaintiff Below, Respondent

vs.) No. 063408

Camden-Clark Memorial Hospital Corporation, Defendant Below, Petitioner

On a former day, to-wit, December 18, 2006, came the petitioner, Camden-Clark Memorial Hospital Corp., by Thomas R. Goodwin, Johnny M. Knisely II and W. Jeffrey Vollmer, Goodwin & Goodwin, LLP, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Wood County, rendered on the 28th day of April, 2006, with the record accompanying the petition. Thereafter, on the 22nd day of December, 2006, came the respondent, Bernard R. Boggs, by Christopher J. Regan, Bordas & Bordas, PLLC; and Christopher A. Rinehart, Carlile Patchen & Murphy, LLP, his attorneys, and presented to the Court his written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justices Maynard and Benjamin would grant.

A True Copy

Attest: /s/ Rory L. Perry
Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 7th of November, 2007, the following order was made and entered:

Bernard Boggs, as Administrator of the Estate of Hilda Boggs, deceased, as personal representative of the statutory beneficiaries of the wrongful death claim herein asserted and in his own right, Plaintiff Below, Respondent

vs.) Nos. 063408 and 070578

Camden-Clark Memorial Hospital Corporation, Defendant Below, Petitioner

On a former day, to-wit, October 3, 2007, came the petitioner, Camden-Clark Memorial Hospital Corporation, by Thomas R. Goodwin, Johnny M. Knisely II and W. Jeffrey Vollmer, Goodwin & Goodwin, LLP, its attorneys, and presented to the Court its motion in writing to renew, out-of-time, its petitions for appeal filed with this Court on December 18, 2006 and February 27, 2007, and refused by orders of this Court on the 20th day of September, 2007, for the reasons stated therein. Thereafter, on the 18th day of October, 2007, came the respondent, Bernard R. Boggs, by Christopher J. Regan, Bordas & Bordas, PLLC; and Christopher A. Rinehart, Carlile Patchen

& Murphy, LLP, his attorneys, and presented to the Court his written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said motion. Justice Maynard would grant.

A True Copy

Attest: /s/Rory L. Perry
Clerk, Supreme Court of Appeals

IN THE CIRCUIT COURT OF WOOD COUNTY,
WEST VIRGINIA

BERNARD BOGGS, as administrator of the estate of Hilda Boggs, deceased, as personal Representative of the statutory beneficiaries of the Wrongful death claim herein asserted and in his Own right,

Plaintiffs,

v.

CAMDEN-CLARK MEMORIAL HOSPITAL CORP.

Defendant.

CIVIL ACTION NO. 03-C-296
Honorable Robert A. Waters

JOURNAL ORDER AND JUDGMENT ENTRY

On the 28th day of February, 2006 came the parties before the Court by their respective counsel Richard A. Hayhurst for the defendant, Camden-Clark Memorial Hospital Corporation, and Christopher J. Regan and Geoffrey C. Brown of Bordas and Bordas, PLLC, and Christopher Reinhart of Carlile, Patchen and Murphy, LLP for the plaintiff, Bernard Boggs.

WHEREUPON, Court was called to order and a venire of prospective jurors was empanelled by the clerk. Following appropriate voir dire by the Court and the parties, a jury of eight was selected, empanelled and sworn.

WHEREUPON, the Court and jury heard opening statements from each of the parties.

WHEREUPON, the Plaintiff called Anna Haney to the witness stand. Miss Haney testified on both direct and cross-examination and was subsequently excused with the consent of both parties.

WHEREUPON, the Court recessed for the day.

The following day, March 1, 2006, the Court was once again called to order.

WHEREUPON, the Plaintiff called Sheila Sleeth to the witness stand. Miss Sleeth testified on both direct and cross-examination and was subsequently excused with the consent of both parties.

WHEREUPON, the Plaintiff called Dr. Glenn Gravlee to the witness stand. Dr. Gravlee testified on both direct and cross-examination and was subsequently excused with the consent of both parties.

WHEREUPON, the Plaintiff called Evelyn Melvin, CRNA by videotape deposition.

WHEREUPON, the Court recessed for the day.

The following day, March 2, 2006, the Court was again called to order.

WHEREUPON, the videotaped deposition of Evelyn Melvin, CRNA continued to the conclusion of the videotape.

WHEREUPON, the remainder of Evelyn Melvin, CRNA's deposition was read to the jury.

WHEREUPON, the Plaintiff called Arthur Shorr to the witness stand. Mr. Shorr testified on both direct and cross-examination and was subsequently excused with the consent of both parties.

WHEREUPON, the Court recessed for the day.

The following day, March 3, 2006, the Court was again called to order.

WHEREUPON, the Plaintiff called Dr. John Burke to the witness stand. Dr. Burke testified on both direct and cross-examination and was subsequently excused with the consent of both parties.

WHEREUPON, the Plaintiff called Kenny Boggs to the witness stand. Mr. Boggs offered testimony on direct examination only.

WHEREUPON, the plaintiff called Sherry Johnston to the witness stand as if on cross-examination. Ms. Johnston testified as if on cross-examination only.

WHEREUPON, the Plaintiff called Sharon Lemmons to the witness stand. Ms. Lemmons offered testimony on direct examination only and was subsequently excused with the consent of both parties.

WHEREUPON, the Plaintiff called Wilma Mowery to the witness stand. Ms. Mowery offered testimony on direct examination only and was subsequently excused with the consent of both parties.

WHEREUPON, the Plaintiff called Bernard Boggs to the witness stand. Mr. Boggs offered testimony on direct examination only.

WHEREUPON, the Court recessed for the weekend.

On Monday, March 6, 2006, the Court was again called to order.

WHEREUPON, the Defendant called Cynthia Kern to the witness stand. Ms. Kern testified on both direct and cross-examination and was subsequently excused with the consent of both parties.

WHEREUPON, the Defendant called Cynthia Carpenter to the witness stand. Ms. Carpenter testified on both direct and cross-examination and was subsequently excused with the consent of both parties.

WHEREUPON, the Court recessed for the day.

The following day, March 7, 2006, the Court was again called to order.

WHEREUPON, the Defendant called Melissa Martin to the witness stand. Ms. Martin testified by direct and cross-examination and was subsequently excused with the consent of both parties.

WHEREUPON, the Defendant called Dr. Robert Azar to the witness stand. Dr. Azar offered testimony on direct and cross-examination and was subsequently excused with the consent of both parties.

WHEREUPON, the Defendant called Dr. Philip Balestrieri to the witness stand. Dr. Balestrieri was examined on direct and cross-examination and was subsequently excused with the consent of both parties.

WHEREUPON, the Court recessed for the day.

The following day, March 8, 2006, the Court was again called to order.

WHEREUPON, the Plaintiff called Dr. Cyril Wecht to the witness stand. Dr. Wecht testified on direct and cross-examination and was subsequently excused with the consent of both parties.

WHEREUPON, the Plaintiff moved the admission of all his tendered exhibits and rested his case.

WHEREUPON, the Defendant recalled Bernard Boggs to the witness stand as if on cross-examination. Mr. Boggs was examined on both cross-examination and redirect examination.

WHEREUPON, the Defendant called Dr, Gary Miller by videotape deposition.

WHEREUPON, the Court recessed for the day.

The following day, March 9, 2006, the Court was again called to order.

WHEREUPON, the Defendant called Mr. John McGinty to the witness stand. Mr. McGinty testified on direct and cross-examination and was subsequently excused with the consent of both parties.

WHEREUPON, the Defendant moved for the admission of all its tendered exhibits and rested its case.

WHEREUPON, the Plaintiff indicated to the Court that he would present nothing in rebuttal.

WHEREUPON, the Plaintiff moved for judgment as a matter of law on the issues ultimately submitted to the jury with the exception of the punitive damage issues. The Court heard

arguments from both parties and the Plaintiff's motions were denied.

WHEREUPON, the Defendant moved for judgment as a matter of law on the issue of informed consent and the issue of negligent hiring. The Court heard argument from both parties and the Defendant's motions were denied.

WHEREUPON, the Court was again called to order and the jury was instructed on the law by the Court.

WHEREUPON, the Court and the jury heard Mr. Regan's summation on behalf of the Plaintiff.

WHEREUPON, the Court recessed for the day.

On the following day, March 10, 2006, the Court was again called to order.

WHEREUPON, the Court and the jury heard Mr. Hayhurst's summation on behalf of the Defendant and a rebuttal by Mr. Regan on behalf of the Plaintiff.

WHEREUPON, the two alternate jurors were excused and the jury of six members retired to begin its deliberations.

Through each day of the trial, the Court took appropriate breaks and recessed for meals as was appropriate and requested by the attorneys or the jury. Objections were heard and are noted and preserved, per the record.

During the course of deliberations, the jury raised two questions for the Court, which the Court brought to the attention of the attorneys. With the assistance of counsel for each side, the Court prepared answers to each of the jury's questions.

WHEREUPON, the jury indicated that it had reached a verdict.

WHEREUPON, the Court was called to order in open Court in the presence of the parties and the clerk and the jury's verdict was read as follows.

Fraudulent Concealment

1. Do you find that Clark-Camden Memorial Hospital fraudulently concealed information about Hilda Boggs' death from Ray Boggs?

____X____YES _____NO

a. What damages do you find resulted to Ray Boggs as a result of the fraudulent concealment?

i. Ray Boggs $100,000.00

2. Do you find that Camden-Clark Memorial Hospital's conduct toward Ray Boggs was so outrageous that a reasonable person could not have been expected to endure it?

____X____YES _____NO

a. What damages do you find resulted to Ray Boggs for the emotional distress he has suffered, or will suffer in the future, for Camden-Clark's outrageous conduct toward him?

i. Ray Boggs - past emotional distress

$250,000.00

ii. Ray Boggs - future emotional distress

$125,000.00

Negligence of Camden-Clark Memorial Hospital

3. Do you find that Camden-Clark Memorial Hospital was negligent toward Hilda Boggs?

____X____YES _____NO

a. Do you find that Camden-Clark Memorial Hospital's negligence was a proximate cause of Hilda Boggs' death?

____X____YES _____NO

If you answer "yes" to question 3a, you must determine damages for each person listed in question 6.

Negligent Credentialing of Dr. Koyawala

4. Do you find that Camden-Clark Memorial Hospital was negligent in credentialing Dr. Koyawala or Evelyn Melvin for allowing them to practice at the Hospital?

_____YES ___X___NO

a. Do you find that Camden-Clark Memorial Hospital's negligence in credentialing Dr. Koyawala or Evelyn Melvin was a proximate cause of Mrs. Boggs' death?

_____YES ___X___NO

If you answer "yes" to question 4a, you must determine damages for each person listed in question 6.

Negligence of Dr. Koyawala or Evelyn Melvin

5. Do you find that Dr. Koyawala or Evelyn Melvin were negligent toward Hilda Boggs?

___X___YES _____NO

a. Do you find that the negligence of Dr. Koyawala or Dr. Melvin was a proximate cause of Mrs. Boggs' death?

____X____YES _____NO

If you answer "yes" to question 5a, you must determine damages for each person listed in question 6.

Damages for Wrongful Death

6. **If you have answered "yes" to question 3a or 4a or 5a,** what damages do you find resulted to Ray Boggs (Mrs. Bogss' widower, Kenny Boggs (Mrs. Boggs' son), Maggie Stump (Mrs. Boggs' mother), Randy Stump (Mrs. Boggs' brother), and Gary Stump (Mrs. Boggs' brother) as a result of Mrs. Boggs' wrongful death?

   a. Ray Boggs' loss of income and household service

   $650,000.00

   b. Ray Boggs' loss of consortium and solace

   $350,000.00

   c. Kenny Boggs' loss of income and household services

   $----------

   d. Kenny Boggs' loss of comfort, society and solace

   $500,000.00

e. Maggie Stump's loss of comfort, society and solace

$50,000.00

f. Randy Stump's loss of comfort, society and solace

$10,000.00

g. Gary Stump's loss of comfort, society and solace

$10,000.00

Actual or Apparent Agency of Dr. Koyawala or Eveylyn Melvin or UAI

7. Do you find that Dr. Koyawala or Evelyn Melvin, or United Anesthesia, Inc. were actual agent of Camden-Clark Memorial Hospital?

_____YES ___X___NO

8. Do you find that Dr. Koyawala or Evelyn Melvin, or United Anesthesia, Inc. were apparent agents of Camden-Clark Memorial Hospital?

___X___YES _____NO

9. Do you find from a preponderance of the evidence that Dr. Koyawala failed to properly disclose to Hilda Boggs the risks associated with her spinal anesthesia?

___X___YES _____NO

10. Do you find from a preponderance of the evidence that a reasonable person in Hilda Boggs' position would have refused to undergo the September, 2001 spinal anesthesia if she had been properly informed about the risks associated with that procedure?

_____YES ___X___NO

If you answer "yes" to questions 9 and 10, you must determine damages for each person listed in question 6.

11. Do you find that the conduct of Camden-Clark Memorial Hospital separate and apart from any conduct of Dr. Koyawala or Evelyn Melvin was so outrageous, wrongful or intentional that the punitive damages should be awarded?

___X___YES _____NO

11a. What amount of punitive damages do you award against Camden-Clark Memorial Hospital?

$3,000,000.00

12. Do you find that the negligence of Dr, Koyawala or Evelyn Melvin was so excessive, reckless or aggravated that punitive damages should be awarded?

___X___YES _____NO

12a. What amount of punitive damages do you award against Dr. Koyawala or Evelyn Melvin?

$1,500,000.00

The verdict was read in open court and neither the Plaintiff nor the Defendant requested that the jury be polled.

WHEREUPON, the jury was excused with the thanks of the Court and the Court recessed for the day.

WHEREFORE, judgment is hereby entered in favor of the plaintiff, Bernard Boggs, as administrator of the Estate of HILDA BOGGS, deceased, as personal representative of the statutory beneficiaries of the wrongful death claims herein asserted, and in his own right individually, and against Camden-Clark Memorial Hospital Corporation in the amount of $4,834,380.00, representing the total verdict of $6,545,000.00 PLUS pre-judgment interest in the amount of $289,380.00 LESS of the $2,000,000.00 credit from the settlement proceed paid on behalf of Dr. Koyawala and United States Anesthesia, Inc. The judgment is calculated as follows:

(1) $3,000,000.00 of the judgment represents the punitive damages awarded by the jury against Camden-Clarke Memorial Hospital Corporation;

(2) None of the judgment represents the $1,500,000.00 punitive damages awarded by the jury against Dr. Koyawala or Evelyn Melvin. That award arises out of the conduct of Dr. Koyawala or Evelyn Melvin, and is, thus appropriately offset by $1,500,000.00 of the $2,000,000.00 credit from the settlement proceeds previously paid on behalf of Dr. Koyawala and United States Anesthesia, Inc.;

(3) $1,359,380.00 of the judgment represents:

a. The $650,000.00 awarded to Bernard Boggs by the jury representing his loss of Mrs. Boggs' income and household services; plus

b. $289,380.00 in aggregated pre-judgment interest on the $650,000.00 awarded to Bernard Boggs by the jury representing his loss of Mrs. Boggs' income and household services, calculated at a simple interest rate of 10% *per annum* from September 29, 2001 to the date of the verdict; plus

c. The $350,000.00 awarded to Bernard Boggs by the jury representing his loss of consortium and solace; plus

d. The $500,000.00 awarded to Kenny Boggs by the jury representing his loss of comfort, society and solace; plus

e. The $50,000.00 awarded to Maggie Stump by the jury representing her loss of comfort, society and solace; plus

f. The $10,000.00 awarded to Randy Stump by the jury representing his loss of comfort, society and solace; plus

g. The $10,000.00 awarded to Gary Stump by the jury representing his loss of comfort, society and solace

LESS

h. The remaining $500,000.00 of the $2,000,000.00 credit from the settlement proceeds previously paid on behalf of Dr. Koyawala and United Anesthesia, Inc.;

(4) $375,000.00 of the judgment represents the jury's award to Bernard Boggs for his past and

future emotional distress arising out of Camden-Clarke Memorial Hospital's outrageous conduct toward him; and

(5) $100,000.00 of the judgment represents the jury's award to Bernard Boggs for his damages arising out of Camden-Clarke Memorial Hospital's fraudulent concealment.

WHEREFORE, upon receipt of the proceeds of this judgment, Bernard Boggs is authorized and directed to distribute said proceeds to the statutory beneficiaries as is consistent with the terms of the jury's awards and the Court's calculations as set forth above.

Post-judgment interest shall run, at 10% per-annum on the amount of judgment, $4,834,380.00, ($1,324.49 per day), from the date of this order until the date the Judgment is satisfied.

SO ORDERED, this 28th day of April, 2006.

/s/ Robert A. Waters
Robert A. Waters, Circuit Judge
Wood County

Prepared by:

/s/ Christopher J. Regan
Christopher J. Regan
Counsel for the Plaintiff,
Bernard Boggs

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

BERNARD BOGGS, as Administrator of the Estate of HILDA BOGGS, deceased, as Personal Representative of the statutory beneficiaries of the wrongful death claim herein asserted and in his own right,

Plaintiff below,
Respondent,

v.

CAMDEN-CLARK MEMORIAL HOSPITAL CORPORATION,

Defendant below,
Petitioner.

PETITION FOR APPEAL

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

BERNARD BOGGS, as Administrator of the Estate of HILDA BOGGS, deceased, as Personal Representative of the statutory beneficiaries of the wrongful death claim herein asserted and in his own right,

Plaintiff below,

Respondent,

v.

CAMDEN-CLARK MEMORIAL HOSPITAL CORPORATION,

Defendant below,

Petitioner.

PETITION FOR APPEAL

Pursuant to W.Va. R. App. P. 3 and W.Va. Code § 58-5-3, Camden-Clark Memorial Hospital Corporation (the "Hospital" or "Camden-Clark") petitions for an appeal of a judgment of the Circuit Court of Wood County, the Hon. Robert A. Waters presiding, in *Boggs v. Camden-Clark Memorial Hospital Corp.*, No. 03-C-296 (W) (Wood (W.Va.) Cir. Ct.). As the Hospital will show below, its petition should be granted.

I. Kind of Proceeding and Nature of the Ruling Below

This case arose from the death of Mrs. Hilda Boggs after attempted surgery at the Hospital in September 2001. Her husband and personal representative, Bernard Boggs, filed this action in the Circuit Court of Wood County in June 2003. He alleged claims for negligence against the Hospital, an anesthesiologist (Dr. Manish Koyawala), and the anesthesiologist's practice group (United Anesthesia). He also asserted that the Hospital was liable on other theories, including fraudulent concealment and outrage. Dr. Koyawala and United Anesthesia reached a pretrial settlement of the claims against them, paying $2 million to Plaintiff,[1] and they were dismissed from the action. After a trial, judgment was entered against the Hospital in the amount of $4,834,380. Of that sum, $3 million represented an award of punitive damages against the Hospital, and another $1.5 million resulted from the Circuit Court's refusal to credit the Hospital with the full amount of the pretrial settlement with the anesthesia providers.

Notwithstanding the Hospital's filing of this petition, it believes that the judgment is not yet ripe for appeal. Why? As is described herein in more detail, the Circuit Court signed a judgment order on April 28, 2006, which order was forwarded to the Clerk of Court for subsequent entry. Entry actually occurred on May 3, and the Hospital then

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[1] *See* Journal Order and Judgment Entry at 9 (stating amount of settlement proceeds).

timely moved for a new trial and to alter and amend the judgment. The Court heard argument on both motions on August 24, 2006, and it stated from the bench that it was inclined to deny them, both on the merits and because it accepted Plaintiff's argument that they were untimely. Because untimely motions would fail to stay the period for perfecting an appeal,[2] the Hospital asked the Court alternatively to grant a two-month extension of time to file a petition, pursuant to W.Va. R. App. P. 3(a) and W.Va. Code § 58-5-4. The Court granted the extension to October 28, 2006.

No written order has yet been entered as regards the Hospital's post-trial motions. Because those motions were in fact and law timely made, the Hospital respectfully submits that its time to file this petition has not even begun to run. Nonetheless, because of the size of the judgment and the procedural conundrum posed by the Circuit Court's anticipated rulings, the Hospital is compelled to file this petition now.

II. Statement of Facts

A. Mrs. Boggs' Surgery and Death

On September 28, 2001, Mrs. Hilda Boggs, a fifty-year-old school teacher at Mineral Wells Elementary in Wood County, fell at work and broke her left ankle. She sought treatment later that day at Camden-Clark Memorial Hospital in

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[2] *See* W.Va. R. Civ. P. 72; *Mooney v. Barton*, 155 W.Va. 329, 184 S.E.2d 322, 325 (1971).

Parkersburg. Her attending physicians determined that she needed surgery to reduce and repair the ankle. She was admitted as an inpatient, and the surgery was scheduled for the next day. Miller Dep. (Nov. 30, 2005) at 4-6.

Mrs. Boggs' overall health was not enviable. She was seriously overweight (230 lb. at just 5'3" tall) and had been diabetic since childhood. She also suffered from asthma and hypertension. Her pre-operative testing, which included an EKG and echocardiogram, revealed that she likely had multivessel coronary artery disease and at least one prior heart attack. Gnegy Dep. (Nov. 4, 2004) at 9. Accordingly, Dr. David Gnegy, a cardiologist, recommended that she not be given general anesthesia, but instead that she be anesthetized only regionally. He described her as "at risk" for surgery, but in his view the risk was an "acceptable" one. *Id.* at 9.

Because of the pre-operative testing and the special concerns it had raised, Mrs. Boggs' surgery was delayed until the evening of September 29. The attending anesthesiologist was Dr. Manish Koyawala, assisted by Certified Registered Nurse Anesthetist (CRNA) Evelyn Melvin. Koyawala and Melvin were both employees of United Anesthesia Incorporated (UAI). They decided to administer spinal anesthesia, which would permit Mrs. Boggs' ankle fracture to be repaired without her totally losing consciousness and, in accordance with the recommendations of Dr. Gnegy, would avoid the dangers of general anesthesia for someone with such

compromised health. Melvin Dep. (Aug. 3, 2005) at 45-51.

Mrs. Boggs was given standard medications to control her pain and to calm her for surgery. Consistently with usual practice, she was placed on heart and pulse oximetry monitors. The Hospital had ensured that the audible alarm features of those monitors were in place and working, but Melvin turned them off. Melvin Dep. (Aug. 3, 2005) at 21-22, 26-28, 143-44.

As the surgeon and other necessary personnel prepared for the ankle repair, Dr. Koyawala administered a spinal anesthetic, lidocaine. Tr. Vol. I (March 1, 2006) at 62. Within a few moments, Mrs. Boggs stopped breathing. Sheila Sleeth, Camden-Clark's circulating nurse, first observed that Mrs. Boggs' complexion had become "dusky," and she quickly alerted those on hand. Tr. Vol. I (March 1, 2006) at 66-67.

Mrs. Boggs was in cardiac and respiratory arrest. Emergency resuscitation efforts began immediately, and those efforts restored both heartbeat and breathing within minutes. Melvin Dep. (Aug. 3, 2005) at 115-17. But Mrs. Boggs had already suffered irreversible brain damage, and she never woke up. She died six days later.

The Boggs family commissioned a private autopsy by Dr. Paul Mellen of Charleston. His observations confirmed the risks revealed in Mrs. Boggs' pre-operative testing. Dr. Mellen found that, at the time of her death, Mrs. Boggs had had

atherosclerosis with greater than 75% narrowing of the left anterior and right coronary arteries, and near total occlusion of the mid-left anterior descending coronary artery. Tr. Vol. I (March 1, 2006) at 99-106. He also concluded that Mrs. Boggs had had multiple heart attacks in the past. Tr. Vol. I (March 1, 2006) at 106. He closed his report with this summary opinion:

> The autopsy showed extensive coronary artery disease with critical stenosis of the left coronary artery[,] multiple myocardial infarcts which would be a risk for sudden cardiac death, as well as hypertensive and diabetic changes of the kidneys, peripheral vascular disease, and mild lung and thyroid disease, and a left ankle fracture. Toxicology testing showed no obvious drug overdose. The death should be considered ACCIDENTAL, as it occurred during surgery for an injury in a high risk patient.

Autopsy of Hilda S. Boggs (Oct. 8, 2001) at 3 (emphasis in original).

Within two or three days of the attempted surgery, while Mrs. Boggs was still alive, her husband Bernard Boggs retained a lawyer. Tr. Vol. II (March 8, 2006) at 347. This lawyer, Christopher Rinehart, then assisted the Boggs family during interviews with the doctors and nurses involved in this incident, and his presence naturally

alerted the Hospital to the likelihood of ensuing litigation.

This likelihood soon became reality. In fact, four suits have now been filed by the Boggs family against the Hospital. The first was never served, while the second and third were substantively identical. The fourth is in its early stages and is not relevant to this appeal. This appeal is from judgment in the second-filed case, Wood Co. Cir. Ct. No. 03-C-296.

B. Summary of the Litigation

In order to conserve the space available, the Hospital will focus in greatest detail on the facts relevant to the most far-reaching of the Circuit Court's errors, which involved the improper disclosure of privileged material to the Plaintiff. In the following pages, the Hospital will demonstrate the various ways in which the Plaintiff exploited these disclosures, and it will do its best to explain and highlight the resulting prejudice that it suffered. In addition, the Hospital will also describe, where appropriate or necessary, several other errors committed by the Circuit Court before, during, and after the trial.

i. Pretrial Errors by the Circuit Court

Document discovery in this case led, as it does in many if not most cases, to objections to certain production on the grounds of privilege. The Hospital made objections as and when it believed they were appropriate, in particular as regards

documents protected by peer review confidentiality under W.Va. Code § 30-3C-3, by the attorney-client privilege, and by the party work product (or "trial preparation materials") rule stated in W.Va. R. Civ. P. 26(b)(3). Well before trial, the Hospital's trial counsel, Richard A. Hayhurst, provided a significant number of documents to the Circuit Court for *in camera* review of the merit of the Hospital's privileged-based objections.

At the pretrial conference on February 10, 2006, Mr. Hayhurst learned that, without notice to him, the Circuit Court had already disclosed a significant portion of this *in camera* submission to the Plaintiff. Tr. (February 10, 2006) at 21-25. This discovery occurred when Plaintiff's counsel began excitedly describing their contents during the pretrial conference:

> **Mr. Regan** [Plaintiff's co-counsel]: There's tremendous stuff in there, Judge. We never knew that Evelyn Melvin had taken three turns herself at trying to administer the spinal to Mrs. Boggs. We didn't know that Dr. Koyawala took two whacks at it.
>
> **Mr. Hayhurst**: How does he know this? You haven't released those documents.
>
> **Mr. Regan**: I do know that. And you know the significance of

it is kind of illustrated by counsel rising so fast to talk about it.

The Court: We're releasing that stuff today. They're being released.

Mr. Regan: I also didn't know that Bernice Burns said we need to get rid of the times on the rhythm strips, which is a shocking act of a hospital employee, saying we need to get rid of the times there. That's critical evidence as to what happened with Mrs. Boggs' heart rhythm. ...

Mr. Hayhurst: Judge, I think I'm entitled to know how they've got material that has not been released by the Court. May I know that, please? I'm not questioning the Court.

The Court: Well, we've gone through what you've given us for in-camera review and we've determined as of today if it was to be released, what was determined ought to be attorney/client privilege. Some was withheld as attorney/client privilege and some was released or withheld because of Chapter 30, Article 3C.

Mr. Hayhurst: I understand.

> **The Court**: Those things were held back, but the other witness statements, hospital records and so forth were released.
>
> **Mr. Hayhurst**: When? I never got notice that they were released.
>
> **The Court**: A letter today. Mr. Regan picked them up.

Tr. (February 10, 2006) at 21-23. Though less than three weeks remained before trial, the Hospital diverted time from its preparation to prepare and file a petition for writ of prohibition in this Court on February 21, 2006, challenging the Circuit Court's action in disclosing the privileged documents. *See State ex rel. Camden-Clark Mem'l Hosp. Corp. v. Waters*, No. 060443 (W.Va). The Petition contains a thorough inventory of the improperly disclosed materials. *See id.*, Petition (Feb. 22, 2006) at 18-23, and appendices. This Court declined to issue a rule to show cause, and so the trial went forward as scheduled.

This Statement of Facts will primarily discuss three particular types of wrongfully disclosed documents: (1) witness interview summaries that constituted trial preparation materials and attorney-client communications; (2) a peer review "trend-tracking" document concerning Dr. Koyawala, commonly referred to throughout the litigation as his "report card"; and (3) a peer review file compiled

during a "root cause analysis" of what went wrong in Mrs. Boggs' case.

The Hospital focuses on these particular documents because their prejudicial use at trial is amply and easily demonstrated throughout the record. These documents, however, do not stand alone; a good deal of other privileged material was also improperly disclosed to Plaintiff by the Circuit Court.[3] These other documents were equally prejudicial to Camden-Clark's defense because they opened a window for Plaintiff's counsel to view Camden-Clark's trial preparation. Their effect is simply less visible in the record and therefore harder to explain in the space available for this petition.

a. Witness Interview Summaries

The witness interview summaries were prepared by Sherry Johnston, Director of Risk Management for Camden-Clark, to assist Mr. Hayhurst in preparing for and defending this litigation. In a series of pretrial hearings, the Circuit Court ruled that these interview summaries were not protected by either the attorney-client privilege or work product rule. Order (August 3, 2005) at 3; Tr. (December 19, 2005) at 81 ("the Court ruled in August that Ms. Johnston, her work was not protected by attorney/client privilege or work product. And that order from August stands."); Tr.

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[3] Among these was a formal external peer review report prepared by Permidion concerning Mrs. Boggs' case. Tr. Vol. III (March 7, 2006) at 19.

(February 10, 2006) at 21-25.[4] This ruling was erroneous because Ms. Johnston was an agent of the Hospital and she prepared these summaries for only one purpose: to assist the Hospital (and its in-house and outside counsel) in preparation for litigation. To this end, the documents were marked "confidential attorney-client communication" at the top. Furthermore, the documents often contained Ms. Johnston's personal thoughts and views on each witness' responses and demeanor, as reflected in notes that were clearly directed towards Camden-Clark's trial counsel.[5] Their status as attorney-client

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[4] The Court repeated its ruling yet again as to four interview summaries produced in a supplemental response by the Hospital at the outset of trial. Tr. Vol. I (Feb. 28, 2006) at 27.

[5] For example, in the Betsy Collins witness interview summary, Ms. Johnston states: "I have told Betsy that our conversation has occurred at the request of the hospital defense attorney. Because I feel that the chance of litigation is high, this attorney has been consulted and has asked for Betsy's memories of the case. Therefore, the content of our conversation together is confidential and not to be shared with anyone other tha[n] the hospital attorney." Similarly, in the Charlie Weedle interview summary, Ms. Johnston writes: "I think that this kid could be well-meaning but he does not have much maturity. He may very well make a poor witness. . . . I also told him that I anticipated litigation and because of this, I had spoke to our defense attorney about the case. The defense attorney, in turn, had asked me to speak with Charlie about his memories. Therefore, our conversation today was confidential and I did not want him speaking of it to other people." Sheila Sleeth's witness interview summary, which had been disclosed before the trial, states that it had been "sent to Richard Hayhurst on 10/15/01." Finally, in the Bernice Burns witness interview summary, Ms. Johnston writes: "I did tell Bernice that she was being interviewed at the request of the hospital's defense attorney and that our conversation was not to [be]

communications and "trial preparation materials" could scarcely be more self-evident.

b. Peer Review "Report Card"

A so-called peer review "report card" is created solely to gather information that can track trends within an individual physician's practice. Mr. Shorr, Plaintiff's own expert witness, conceded to the court (outside the hearing of the jury, however) that such a report card is considered peer review material:

> **The Court**: Let me ask him if he knows, as a hospital administrator, is this considered peer review material.
>
> **The Witness**: It is considered peer review material in the context of the specific review of each incident. It is considered credentialing material when it is factored into the credentials committee to answer the larger question: Is this person competent.

Tr. Vol. I (March 2, 2006) at 295.[6]

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shared with anyone. . . . This RN has a tendency to make statements which, when questioned, she has to re[s]cind . . . . (This report given to Richard Hayhurst on 10/18/01)."

[6] The distinction Mr. Shorr draws between peer review and credentialing is meaningless in West Virginia, because credentialing *is* "peer review." Syl. pt. 5, *State ex rel. Charles Town Gen. Hosp. v. Sanders*, 210 W.Va. 118, 556 S.E.2d 85 (2001).

Dr. Koyawala's peer review report card tracked his practice from September 5, 1999 to October 2, 2001. Tr. Vol. I (March 2, 2006) at 304. It contained summaries of three events in which he had been involved. Tr. Vol. I (March 2, 2006) at 281-82. If certain trends reveal themselves, this tracking mechanism can trigger a more in-depth peer review investigation; however, no fault had been found on Dr. Koyawala's part in any of three "incidents" listed in the report card.[7] Nevertheless, the Circuit Court disclosed this document to Plaintiff, and allowed its use as an exhibit throughout the trial.

c. Root Cause Analysis

Among the many other privileged peer review materials wrongfully disclosed to Plaintiff were documents from Camden-Clark's Root Cause Analysis file. Tr. (February 10, 2006) at 21-24; Tr. (February 24, 2006) at 94-97.

A "root cause analysis" is a type of peer review that is triggered by the occurrence of a "sentinel event." A sentinel event is, in turn, a major or alarming incident at a hospital that merits review and investigation. When a sentinel event occurs, the hospital investigates from as many angles as possible to try to find out *why* the event occurred – the root cause. Tr. Vol. II (March 6, 2006) at 105-10.

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[7] Inasmuch as an unexpected or unfortunate event can occur without anyone being at fault, it obviously can occur without *everyone* being at fault. The incidents were on Dr. Koyawala's report card because he was there, and for that reason alone.

Root cause analysis is a privileged peer review function under West Virginia law.

The Circuit Court gave Plaintiff's counsel, among other things, Root Cause Analysis meeting minutes that were clearly labeled "Protected under WV Code 30-3C-3." RCA Meeting Minutes (October 4, 2001) at 1. This meeting occurred on October 4, 2001, the day before Mrs. Boggs' death. *Id.* at 1, 5. At the meeting, a group of doctors and nurses shared their recollections and discussed their thoughts on the incident. *Id.* at 1-4. Participants were instructed that "[t]his is under peer review protection – do not discuss outside, no notes to be taken during this meeting." *Id.* at 1. The group identified "[t]hings to check on" and devised a "Plan of Correction." *Id.* at 4.

Even Plaintiff's counsel was surprised that the Circuit Court gave him the minutes of this meeting, as he candidly admitted to the Circuit Court a few days before trial. Tr. (February 24, 2006) at 94-97. Nevertheless, he did not hesitate to use the minutes during an *in camera* examination of Cynthia Carpenter[8] at trial – in support of a logic-twisting argument that any witness statements or notes prepared after the meeting could not be a part of the root cause analysis. Tr. Vol. II (March 6, 2006) at 145-47. This spectacle – Plaintiff's counsel using one wrongfully obtained privileged document to argue that other privileged materials were

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[8] Ms. Carpenter was the Hospital's Director of Quality Assurance and Medical Staff Office at the time of Mrs. Boggs' death. Among her duties was coordinating the peer review process.

undeserving of protection – elegantly illustrates the layers of prejudice that were heaped upon the Hospital during the trial.

Plaintiff's access to the root cause analysis, together with the witness statements from Ms. Johnston's investigation, also combined to provide Plaintiff with material that he could distort into his most inflammatory allegation at trial – that Johnston instructed witnesses to destroy evidence. What actually happened is readily explained within the context of the privileges on which the Hospital relied. Ms. Carpenter asked several persons to write out their recollections for the use of the root cause analysis – these notes were neither spontaneously written nor composed for any other purpose. When two of these same persons (Charlie Weedle and Anna Haney) were independently interviewed by Ms. Johnston, they stated that they had made copies of what they had given Ms. Carpenter. Because the notes were privileged peer review documents, Ms. Johnston advised these persons that they should not keep personal copies. Tr. Vol. I (March 3, 2006) at 502-503, 512-515, 521.[9]

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[9] Ms. Johnston's concern that copies of peer review materials not be maintained outside the review organization was not merely for the self-interest of the Hospital. As the Hospital discusses below but should note here, it has an obligation *to the providers whose actions are the subject of the peer review* to maintain the confidentiality of the file.

Plaintiff also theorized below that the notes of a third witness, Bernice Burns, had disappeared or been destroyed. The Hospital does not have them, if they ever existed. Burns did testify that she was not told to destroy notes. Burns Dep. at 71.

ii. Plaintiff's Use of the Hospital's Privileged Documents at Trial

The trial proved to be as much or more about the Hospital's claims of privilege than the underlying wrongful death action. The contentions of the parties as regards the causes of Mrs. Boggs' death can be quickly summarized. Plaintiff asserted that his wife died because of an overdose of anesthesia, a failure to properly monitor her cardiopulmonary status, or both. The Hospital countered that both the dose of anesthesia and the method of monitoring violated no established standards, and that Mrs. Boggs' preexisting compromised condition caused her to be unable to tolerate the procedure. The Hospital also showed, of course, that neither Koyawala nor Melvin was its agent or employee. Had these contentions alone been presented to the jury, and the law then properly applied to the verdict, it is unlikely that this petition would ever have been filed.

But of course it did not happen that way. Instead, Plaintiff made extensive use of the improperly disclosed documents, flooding the trial with information that should have been protected under the attorney-client privilege, the peer review privilege, or by Rule 26(b)(3). In his opening statement, Plaintiff's counsel immediately began emphasizing the content of the privileged materials to the jury. For example, he told the jury that "Dr. Koyawala had been involved in a previous death," an allegation that was based solely on one incident from Dr. Koyawala's peer review report card. Tr. Vol. I (Feb. 28, 2006) at 6. The Hospital's objection was

overruled. Tr. Vol. I (Feb. 28, 2006) at 7. Emboldened by the Circuit Court's ruling, Plaintiff's counsel elaborated on this line of argument by stating that "[t]he hospital knew that he had been involved in a previous death, and two other dangerous situations, but they never told the Boggs family." Tr. Vol. I (Feb. 28, 2006) at 7.

Plaintiff further relied on privileged materials during witness examinations. For example, Plaintiff's counsel examined circulating nurse Sheila Sleeth using the summary of her interview by Ms. Johnston. Plaintiff contended throughout trial that a set of Mrs. Boggs' printed cardiac monitoring strips had originally displayed printed times but no longer bore those times at trial. His counsel argued that these alleged printed times had been tampered with, cut off, or otherwise obliterated. His problem was a lack of evidence of it.[10] After Ms. Sleeth testified on direct that she had never heard anyone discuss removing these times, Plaintiff's counsel then used the Hospital's witness interview summary to impeach this response. During her interview with Ms. Johnston, Ms. Sleeth had described a "vague recollection" of hearing another nurse say "[w]e need to get rid of those times." Tr. Vol. I (March 1, 2006) at 75-77. In addition, Plaintiff's counsel asked whether Camden-Clark had provided a copy of the statement to Ms.

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[10] Times are not printed along the top of periodic strips (*i.e.* strips run for short periods on demand), as opposed to continuous strips used to track heart function over a longer span. Tr. Vol. I (March 1, 2006) at 102, 104-05, 110, 112. Periodic strips were the only ones run on Mrs. Boggs during her resuscitation. *Id.* at 74-75.

Sleeth during the preparation for her deposition, which prejudicially insinuated that Camden-Clark had tried to hide the interview summary from her. Tr. Vol. I (March 1, 2006) at 80.

In some cases, privileged documents were actually admitted into evidence.[11] A prime (and particularly prejudicial) example is Dr. Koyawala's "report card." When Plaintiff proposed to show it to a witness and to the jury, the Court was initially hesitant: "This is something that could mislead the jury because here it is, three incidents listed, just like that." Tr. Vol. I (March 2, 2006) at 298. Besides being privileged, the document was indeed misleading – Dr. Koyawala had not been determined to have any responsibility in any of the three incidents. Nonetheless, the Circuit Court soon reversed course, disregarding the purpose of peer review confidentiality, misconstruing the reasons for tracking trends and events for peer review purposes, and ultimately admitting Dr. Koyawala's "report card":

> **The Court**: ... [H]ow do you find out a situation in which the hospital denies that there ever was any negative information about Dr. Koyawala, and years later, you found out that there was. Doesn't that create a manifest injustice? How is a plaintiff supposed to present their case?

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[11] Of the witness interview summaries prepared in anticipation of litigation, the Circuit Court admitted three into evidence: those of Charlie Weedle, Bernice Burns, and Anna Haney. Tr. Vol. II (March 8) at 372; Vol. III (March 9) at 191.

Mr. Hayhurst: There isn't anything negative about Dr. Koyawala.

The Court: Why did they put this down on this paper, these incidents? There must have been a concern at one time.

Mr. Hayhurst: If you want Cynthia Carpenter to come and explain that, we will bring her. . . . We are required to track trends in the practice of medicine. We are required to do that to determine whether there is a reason to investigate a doctor. If that doctor—how would we ever know, for example, if a doctor had excessive infection rates, if a surgeon ever had excessive infection rates, unless we kept track of that. One infection does not create a trend. Two may not. But if a doctor persistently turns up with wound infections during surgery at our hospital, and he is the only doctor that does on that day, then we have got to wonder whether he is involved in aseptic surgery. That is why we track things. That doesn't mean—the fact that something is entered in a tracking document doesn't mean that the doctor did anything wrong in that occasion, but they are all investigated, and they were in this case.

* * *

The Court: What did you say in opening statement about his record?

Mr. Regan: No incidents had been reported to the hospital administration.

Mr. Hayhurst: And that is true.

The Court: What is on that paper?

Mr. Hayhurst: Judge, no incidents involving culpable misconduct. Every doctor, every nurse has incidents that happen from time to time. They are investigated. If they are determined to have any validity to them, they are further investigated, and action is taken.

Mr. Regan: Judge, I don't see what else I could possibly need to justify the admission of this document beyond counsel's statement that he told the jury, in opening, that there were no incidents reported with this doctor. I mean, there are three right there. How could he possibly get away with something like that?

> **The Court**: Okay. I am going to overrule the objection. Plaintiff's exhibit 5 may be admitted, and then the hospital can explain it, that it doesn't mean a thing, that it is meaningless; even though they track these incidents, yet they are meaningless.

Tr. Vol. I (March 2, 2006) at 300-03.

The admission and publication of this document to the jury was error in its own right, but it also created other extraordinary and unfair difficulties for the Hospital's defense. First (and perhaps chief) among these was rebutting the misimpressions Plaintiff deliberately sought to create concerning the three events identified on the document. As trial counsel attempted to explain to the Circuit Court: "Judge, the trouble is I can't counter [the trend-tracking report card] without breaching the peer review and patient confidentiality because I have to bring patient charts in here." Tr. Vol. I (March 2, 2006) at 288.

In other words, the Hospital could not hope to effectively explain this privileged document *without using other privileged documents*, and in fact, Mr. Hayhurst ultimately resorted to using redacted versions of confidential patient charts in an attempt to do so. Tr. Vol. II (March 6, 2006) at 8-9, 11. There is scant reason to suppose that he succeeded. He certainly should not have been put to the task.

In any event, after the "report card" was in evidence, Plaintiff wasted no time in putting it to uses that were highly prejudicial to the Hospital. Specifically, Plaintiff's counsel asked Mr. Shorr the following questions, among others: (1) "[D]oes that document reflect whether or not Dr. Koyawala was involved in incidents that, according to the document, created a risk of harm to patients?"; (2) "[I]s there an incident on Dr. Koyawala's variance report that resulted in a death?"; (3) "Is this the type of information that you had previously told the jury should be taken into account by the hospital administration in reviewing credentials?"; (4) "And then there were additional incidents, in the documents that I handed you, where the hospital found potential for harm?"; (5) "Knowing all of this, as a hospital administrator, in your opinion, should this have triggered a review or revocation of Dr. Koyawala's credentials to practice medicine at Camden-Clark Memorial Hospital?" Tr. Vol. I (March 2, 2006) at 303-306. In response to each query, Mr. Shorr, Plaintiff's retained expert witness, answered affirmatively.

In addition, Plaintiff's counsel used privileged documents during his direct examination of several other witnesses.[12]

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[12] For example, Plaintiff's counsel relied on Sheila Sleeth's interview summary to correct Ms. Sleeth's recollection regarding whether she had ever seen CRNA Melvin administer a spinal anesthetic. Tr. Vol. I (March 1, 2006) at 56. In addition, Plaintiff's counsel used the Charles Weedle and Bernice Burns interview summaries to question Mr. Shorr regarding the alleged destruction of notes. Tr. Vol. I (March 2, 2006) at 319-22. During his adverse examination of Ms. Johnston during Plaintiff's case in chief, counsel used both the

Things were of course no different when Plaintiff's counsel undertook to cross-examine the Hospital's witnesses. He asked Cynthia Carpenter, who coordinated the peer review process at the Hospital, a large number of questions based on Dr. Koyawala's "report card." Tr. Vol. II (March 6, 2006) at 111-128, 138-140. The inescapable result of these questions (and no doubt their intended purpose) was to make unfounded and misleading comparisons between Mrs. Boggs' surgery and the three prior incidents listed on the peer review report card. Tr. Vol. II (March 6, 2006) at 117-19. For example, in one of the prior incidents the patient had a low oxygen saturation level, a low pulse, and appeared "dusky," all of which resemble the symptoms displayed by Mrs. Boggs. *Id.* Plaintiff's counsel elicited these similarities for one simple purpose: to suggest (incorrectly) that Mrs. Boggs' death was just the latest in a pattern of similar bad results.

Misuse of the "report card" took other forms. In one twist, during cross-examination of the Hospital's expert in the field of healthcare management, John McGinty, the following exchange occurred:

Anna Haney and Weedle interview summaries to examine Ms. Johnston, focusing in particular on Ms. Johnston's alleged directions to destroy personal copies of notes. Tr. Vol. I (March 3, 2006) at 508-521. Finally, Plaintiff's counsel again relied upon the witness interview summaries during his redirect examination of Dr. Cyril H. Wecht, Plaintiff's expert forensic pathologist. Tr. Vol. II (March 8, 2006) at 319, 332.

Q [by Plaintiff's Counsel]: Did you review Dr. Koyawala's report card for his clinical variances?

A [by Mr. McGinty]: I did not. I reviewed depositions where those were referred to.

Q: The jury has seen a document that has come into evidence that described a previous death in which Dr. Koyawala was involved as well as two dangerous incidents. Did you see that document before you came in court today?

A: No. I saw a deposition that made reference to those documents.

Q: But you haven't seen that document is the answer to my question; right?

A: I have to answer that I have not seen the document.

Q: Okay. So, you didn't see what Dr. Koyawala told Camden-Clark because the copy of the application you read was blacked out; right?

A: Right.

> **Q**: And you didn't see his report card for his clinical variances before you came into court today to give your testimony that he was properly credentialed by Camden-Clark Memorial Hospital; right?
>
> **A**: Correct. I did not see the completed application. As I testified, I didn't expect to, and I shouldn't see that confidential peer review information. The same with the confidential peer review report card. I did not see it.

Tr. Vol. III (March 9, 2006) at 80-81. In other words, Plaintiff suggested that Mr. McGinty was necessarily less credible because the Hospital *did not* violate peer review confidentiality by showing him things that the Hospital could not show him.[13]

Some of Plaintiff's exploitation of his victory in (erroneously) obtaining peer review documents amounted to simply celebrating his victory in front of the jury. For example, also during the McGinty cross examination, Plaintiff's counsel queried:

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[13] In this regard, the Hospital must point out that it has no power to simply waive peer review confidentiality and share a document with a witness (or anyone else), even if it is in the Hospital's self-interest to do so. The power to waive confidentiality rests with the practitioner who is the subject of the peer review, in this case, Dr. Koyawala. *See* W.Va. Code § 30-3C-3.

> **Q [Plaintiff's Counsel]**: ... [A]t your hospitals, for example, did they tell anybody when they come in, "We're going to be taking care of you. But if it goes bad, you are not going to find out the truth about what happened, because we keep all of that confidential through our peer review process?" Did you ever work at a hospital that told people that going in?
>
> **A**: I don't believe at any hospital that I worked at or that I participated with as a consultant would I have seen a document that would have expressed what you just described.
>
> **Q**. Certainly no thought that the Boggs family was advised going into this surgery that if things went bad with Mrs. Boggs that the hospital would feel free to put everything behind this wall of peer review and not tell them the truth about what happened?
>
> **A**: Correct.

Id. at 94-96. Through rhetoric-laden questioning like the foregoing, an assertion of privilege (and a well-taken one at that) was transformed into one of the pillars of Plaintiff's theories of liability. In addition to the specific instances quoted above,

Plaintiff's counsel also used privileged documents during his cross-examination of other witnesses.[14]

This wrongful disclosure and misuse of privileged documents had a ripple effect throughout the entire case that is easier to describe than to measure. The Hospital was not only forced to contend with the contents of the documents, but also was put in the awkward (and difficult) position of being forced to defend and vindicate the peer review regime itself in the jury's eyes. For example, during his cross-examination of Mr. Shorr, Mr. Hayhurst had to engage in a lengthy (and otherwise wholly unnecessary) discussion of the federal peer review mechanism, Congress' intent in passing the legislation, the purpose of the privilege, and West Virginia's own legislation on the subject. Tr. Vol. I (March 2, 2006) at 325-337. During the direct examination of Cynthia Carpenter, counsel was forced to spend a significant amount of time examining the witness about Dr. Koyawala's peer review "report card" and its role within the Hospital's peer review process. Tr. Vol. II (March 6, 2006) at 94-105. Furthermore, Mr. McGinty was examined at length regarding peer review processes,

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[14] For example, Plaintiff used Sheila Sleeth's interview summary to cross-examine Melissa Martin, the Hospital's expert on medical records management. Tr. Vol. II (March 7, 2006) at 185-86. Also, during Plaintiff's cross-examination of Dr. Philip Baliestrieri, an expert on anesthesia, Plaintiff's counsel referred to the interview summaries and asked Dr. Baliestrieri whether the Hospital had provided copies of those documents to him. Tr. Vol. III (March 7, 2006) at 134.

mechanisms, and confidentiality. Tr. Vol. III (March 9, 2006) at 51-68.[15]

Such unusual testimony was necessary to attempt to refute the Plaintiff's frequent insinuation – and sometimes, as we have seen, outright charge – that the Hospital used peer review to fraudulently conceal documents and information from the Boggs family. Tr. Vol. III (March 9, 2006) at 61, 67-68. The testimony was also devoted to rebutting the suggestion, which had arisen primarily from the wrongfully admitted witness interview summaries, that Ms. Johnston had instructed hospital employees to destroy evidence. Tr. Vol. III (March 9, 2006) at 66-67.

In sum, privileged documents not only became Plaintiff's star evidence, but their withholding also became his theory of the case. Meanwhile, the Hospital's trial counsel labored to defend not just the subject of the litigation, but also the conduct of the litigation and the social wisdom of the privileges asserted.

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[15] The Hospital can of course cite other examples. Mr. Hayhurst was also forced to address peer review confidentiality issues during his redirect examination of Dr. Balestrieri, by asking whether Dr. Balestrieri would expect to be shown such confidential documents. Tr. Vol. III (March 7, 2006) 141. During his cross examination of Dr. Wecht, Mr. Hayhurst also essayed to defend the peer review process, the hospital's treatment of confidential documents, and the prejudicial implications of the witness interview summaries. Tr. Vol. II (March 8, 2006) 321, 340-42.

iii. Errors in the Instructions and Verdict Form

The Circuit Court mishandled the preparation and giving of the jury charge. Examples of this mishandling are highlighted here.

The Circuit Court exhibited some confusion regarding the law of punitive damages, and this confusion ultimately resulted in a misleading verdict form. The instructions curiously provide for the prospect of punitive damages against two people who were not even parties: Dr. Koyawala and CRNA Melvin. The inclusion of these two non-parties created unnecessary and prejudicial difficulties with the instructions and verdict form, as is evidenced by the trial transcript:

> **The Court**: . . . What about No. 12, punitive damages to Dr. Koyawala or Mrs. Melvin? What happens if they award—is the hospital liable for punitive damages if the award is against Dr. Koyawala or Evelyn Melvin?
>
> **Mr. Hayhurst**: No. And I think I need another instruction. A master is not punitively liable for the punitive misconduct of the servant absent expressed authorization or expressed ratification.
>
> * * *

> **The Court**: Well, under what theory do have [*sic*] we then decided Koyawala of Melvin should have punitive damages awarded against them?
>
> **Mr. Hayhurst**: I didn't decide that.
>
> **Mr. Regan [Plaintiff's co-counsel]**: The deactivation of the safety alarms, Judge, the jury could certainly find that that's reckless. ...
>
> * * *
>
> **The Court**: Well, obviously under apparent or actual agency or other theories where the hospital would be liable, the hospital would be vicariously liable for the negligence [of] Dr. Koyawala and Mrs. Melvin. But since punitive damages aren't to punish Dr. Koyawala and Mrs. Melvin and the hospital, is the hospital to be liable for punitive damages against Dr. Koyawala or Mrs. Melvin, because I guess they're not being punished?

Tr. Vol. III (March 9, 2006) at 179-81. The question was further complicated by the differing conduct underlying Plaintiff's punitive damages theories. Plaintiff readily conceded that the only conduct for which he believed Camden-Clark could be held

independently liable for punitive damages was in essence a claim of intentional spoliation of evidence:

> **The Court**: In 11 and 12, why do we use different words for punitive damages with the hospital and against Dr. Koyawala and Nurse Melvin? What's the difference?
>
> **Mr. Regan [Plaintiff's co-counsel]**: The difference is that the wrongs alleged against Camden-Clark for which punitive damages are awardable are intentional. Nobody is claiming that they carelessly destroyed the evidence or recklessly destroyed the evidence, they did it on purpose. And with respect to Dr. Koyawala and Evelyn Melvin by contrast nobody is claiming that they intentionally wanted Mrs. Boggs to be harmed, but rather that they were recklessly indifferent to her safety in turning off the monitors. So, I think the appropriate language of punitive damages are available both for reckless and intentional misconduct, and that's why I separated it out that way.[16]

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[16] During his closing argument, Plaintiff's counsel reiterated his belief that Camden-Clark's exposure to punitive damages hinged on the fraudulent concealment claim:

> And then there's another question there, if you think Camden-Clark Memorial Hospital is liable for punitive damages. And that question,

Tr. Vol. III (March 9, 2006) at 183-84. This jumbled discussion ultimately led to a most unusual and unclear verdict form:

> **The Court**: The first thing I'm going to do is put a separate line in there under 11-A. What amount of punitive damages do you award against Camden-Clark Memorial Hospital? And change the 13 to a 12-A, what amount of damages do you award against Dr. Koyawala or Nurse Melvin? So, it would cancel out the verdict as to whether Camden-Clark is liable for punitive damages against Koyawala and Melvin.
>
> **Mr. Hayhurst**: I'd ask that you make it clear that they should not consider the conduct of Melvin and Koyawala in connection with their assessment of Question 11-A.

> really by that time, you will have already answered it, because if you find that they have fraudulently concealed these things from the family, that the evidence is, in fact, gone, that they have covered this us . . . then you will have to ask yourself whether or not you think that conduct is . . . so outrageous, wrongful or intentional that punitive damages should be awarded?

Tr. Vol. III (March 9, 2006) at 254.

> **The Court**: 11-A is to award punitive damages for the conduct of Camden-Clark.
>
> **Mr. Hayhurst**: Yes. But they are indicating that the conduct of Koyawala and Melvin is the conduct of Camden-Clark in a number of their theories.
>
> **The Court**: Okay. I can foresee problems if they come back with no punitive damages against Camden-Clark, but punitive damages against Koyawala and Melvin.

Tr. Vol. III (March 9, 2006) at 185-86. The remedy for these "problems" was of course not to submit the punitive damages liability of two empty chairs to the jury in the first place. Nonetheless, after a bit more discussion, the Circuit Court added one further "clarification" to the punitive damages charge:

> **The Court**: I'm going to refuse [Camden-Clark's proposed instruction,[17]] because that's going to create more confusion without further help. My initial thought would be that

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[17] The rejected instruction read as follows: "The hospital is not liable for punitive damages simply because Dr. Koyawala or Nurse Melvin may have acted in such a fashion as to justify an award of punitive damages against them absent an express authorization for the agents to engage in that misconduct or an express ratification of that misconduct." Tr. Vol. III (March 9, 2006) at 183.

the hospital is liable for punitive damages against them but not liable for punitive damages against Koyawala and Melvin, but I may be wrong.

Mr. Hayhurst: I think the Court is right, but I would like the verdict form specifically to the jury or an instruction to tell the jury they can't consider the conduct of Koyawala or Melvin in determining whether Camden-Clark was guilty of punitive misconduct.

Mr. Regan: Well, he's gone as far as that can go, is to give the two separate lines that the Court has already agreed to.

Mr. Hayhurst: They are incomplete and misleading. Because if they say yes to both questions and award damages, we have no way of knowing whether they included the conduct of Melvin and Koyawala in the appraisement of Camden-Clark's conduct.

* * *

The Court: If you find that the conduct of Camden-Clark Memorial Hospital was separate and apart from the conduct of Dr. Koyawala and Nurse Melvin, CRNA Melvin, I'm

> just going to put Evelyn Melvin. And I'm going to put separate and apart. So, 11 would read, "Do you find that the conduct of Camden-Clark Memorial Hospital separate and apart from any conduct of Dr. Koyawala or Evelyn Melvin was so outrageous, wrongful or intentional that punitive damages should be awarded?" Is that agreeable?
>
> **Mr. Hayhurst**: Without waiving the position that I've already taken.

Tr. Vol. III (March 9, 2006) at 187-89.

The verdict form's contortions over punitive damages were not the only problems with the way the case was submitted to the jury. Some of the instructions were simply misleading, often because of a failure to carefully distinguish the Hospital's conduct from Koyawala's or Melvin's, or a failure to carefully describe the conditions under which the Hospital could be held liable for their conduct. For example, the Circuit Court gave the following instruction on informed consent:

> A doctor is required to reasonably disclose to his patient all material facts within the doctor's knowledge relating to the proposed treatment. This disclosure is necessary for the patient's consent to treatment to be based on an intelligent exercise of the judgment of the patient. The doctor must explain in

> terms which a layperson can understand the nature of any significant risks that may be encountered as a result of the treatment. Failure to so inform the patient is negligence. Therefore, if you find that Dr. Koyawala did not make such disclosure to Hilda Boggs before her consent was obtained, you should find *the defendant* liable for all injuries which resulted from the treatment administered. If you find that Mrs. Boggs did not give an informed consent, *the defendant is liable* for each and every unfavorable consequence of the procedure even if Dr. Koyawala performed the procedure appropriately. Mrs. Boggs did not give her informed consent if a reasonable person in her position would have refused the procedure if he or she had been provided with all of the pertinent information.

Tr. Vol. III (March 9, 2006) at 209-10 (emphasis added). Inasmuch as Camden-Clark was the only defendant at trial, it is arguable that the jury could have interpreted this instruction as simply directing liability against it for Dr. Koyawala's actions.[18] The instruction certainly misstates West Virginia law.

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[18] Ultimately, the jury did in fact find a lack of informed consent, but it also concluded that a reasonable person would not have refused the spinal anesthesia even if she had been fully informed.

See Cross v. Trapp, 179 W.Va. 459, 294 S.E.2d 446 (1982).

A similar degree of carelessness crept into this instruction on punitive damages:

> If you find, therefore, from the evidence that the defendant, Camden-Clark, or Dr. Koyawala, or Evelyn Melvin, acted with willfulness, wantonness and maliciousness or in any manner so wanton or reckless as to manifest a willful disregard for the rights of Ray and Hilda Boggs, in addition to compensatory damages, *you may award as punitive damages such further sums as you may think right in view of all of the circumstances of the case*. You are further instructed that for the plaintiff to recover punitive damages, actual malice need not be shown from the evidence, [if] you believe that the wrongful acts *of the defendant* were committed under such circumstances as to show a willful disregard of Ray and Hilda Boggs' rights, for in such cases the law infers malice.

Tr. Vol. III (March 9, 2006) at 216-17 (emphasis added). Again, the lack of specificity could have misled the jury into concluding that it was permissible to punish Camden-Clark for the actions of Koyawala or Melvin.

iv. Use of Wrongfully Disclosed Privileged Documents by Plaintiff During Closing Argument

During Plaintiff's closing argument, he of course squeezed all he could out of the errors described above. Plaintiff's counsel frequently referred to the privileged materials and re-emphasized their contents. But perhaps even more damaging was Plaintiff's equating Camden-Clark's justified (but failed) reliance on its various privilege arguments during the litigation with fraudulent concealment. In this regard, Plaintiff went so far as to request that the Court forbid any rebuttal of his argument. His counsel requested that the court (1) prohibit the Hospital from arguing that any documents were withheld because they were privileged and (2) instruct the jury that none of the documents used at trial are privileged or entitled to confidential treatment. Tr. Vol. III (March 9, 2006) at 139-143. The Circuit Court ultimately deferred ruling on Plaintiff's requests, and does not appear to have ever returned to these issues, leaving the door open for Plaintiff's counsel to advance these improper arguments during his closing statement. Tr. Vol. III (March 9, 2006) at 145.[19]

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[19] A discussion on the same subject during the pretrial conference had been strikingly different. At that time, the Circuit Court seemed strongly inclined to prevent Plaintiff's counsel from advancing such a misleading and prejudicial position:

> **Mr. Hayhurst**: Of the other issues that are before the Court for decision, I think there's only one from my standpoint that I think we need real guidance on at this structure and that is whether you're going to

As indeed he did. One of the very first things Plaintiff's counsel did in his closing was to link the fraudulent concealment claim to Camden-Clark's supplemental document production at trial:

> The first thing I want to talk to you about is the first question on that form.

> allow the Plaintiff to argue in support of its claims for fraud and tort of outrage, facts and occurrences that occurred after the complaint was filed, i.e. try Camden-Clark because of its litigation posture. Either we committed fraud or the tort of outrage before the suit was filed or we didn't. If we did, there's grounds to prosecute. If we didn't, there isn't grounds to prosecute. But I think the law is crystal clear – and I've supplied the Court with what authority I could find – events that occurred outside after the complaint was filed are not admissible to prove the existence of a cause of action that existed at the time the suit was filed. . . . What he's trying – what he's trying to do is to try my conduct, and I'm not perfect and I'm not the best lawyer in the world.
>
> **The Court**: The hospital can't be held responsible for the trial lawyer's tactics. . .
>
> * * *
>
> **Mr. Hayhurst**: The issue is that my trial – my pre-trial conduct is not going to be part of this suit. Is that what the court's ruling is?
>
> **The Court**: Correct. . . . We're not going to try Mr. Hayhurst's conduct.

Tr. (February 10, 2006) at 30-31, 33, 37. As this petition demonstrates, the Circuit Court's prediction proved most inaccurate.

> It deals with fraudulent concealment. The first question on the jury verdict form that you will consider, "Do you find that Camden-Clark Memorial Hospital fraudulently concealed information about Hilda Boggs' death from Ray Boggs?" And that's not going to be any surprise to you. I'm asking you to answer that question with yes, and I'll tell you why. The hospital fraudulently concealed the truth about what happened to Mrs. Boggs by telling nurses to destroy notes, by giving the Boggs family a record that didn't tell the true story about what happened, *by hiding documents right up until the trial was going on in this case*, and by basically going along with Dr. Koyawala's plan to tell the same story or there was going to be trouble in this case.

Tr. Vol. III (March 9, 2006) at 222-23 (emphasis added).

Plaintiff's counsel also derived significant benefit during his closing from the improperly disclosed privileged documents. He used Sheila Sleeth's witness interview summary to argue that the monitoring strips had been altered, and he used Bernice Burns' interview summary to argue that Ms. Burns' notes had been destroyed. Tr. Vol. III (March 9, 2006) at 226-28. Plaintiff's counsel then proceeded to display the privileged witness

interview summaries themselves to the jury. First, he brought up the Charlie Weedle summary:

> This is another big part of the fraudulent concealment in this case. ... This document was made by Sherry Johnson, the hospital's corporate representative. It has come into evidence before you so you can see it. And right there at the top of it, "Charlie states that he did" – it's talking about notes. It says, "Charlie states that he did this but made himself a copy. I have told him to destroy his copy." Ladies and gentlemen, I cannot bring you more clear-cut evidence of fraudulent concealment than the hospital's own corporate representative telling people who witnessed what happened to destroy their notes.

Tr. Vol. III (March 9, 2006) at 232-33. In short, Plaintiff's counsel drew highly prejudicial conclusions from privileged documents that the Circuit Court should never have permitted him to have.

Plaintiff's counsel then continued to advance the misleading and erroneous arguments regarding peer review and fraudulent concealment to which he had earlier alerted the Circuit Court. As the following excerpt demonstrates, Plaintiff's counsel again advanced the theory that the fraudulent concealment claim should be based on the

Hospital's reliance on the peer review privilege during litigation:

> I mean, every person suffers enough when they lose a loved one. It's one of the worst things that can possibly happen to you in your lifetime. But to compound it like this and mislead and obstruct and get rid of the evidence, I mean, *it continued right through this trial*. To put Mr. McGinty on the stand today to smile at you and say it's ok to destroy the evidence, and that this family has no right to know the truth, it's all peer review—let me say something about that, by the way. *Not one thing that is going into evidence before you is peer review, not one thing. The Court has determined that those things are not peer review*, which is the very reason that those things have come before you. So, *don't believe anybody who tells you that all of the facts are peer review*, and it's some kind of secret that they're entitled to keep. It is not. And the Court has already ruled that and provided that to us, so that we could tell you the truth about what happened. But they didn't want to tell the truth to Ray Boggs. They wanted everything behind the wall. They knew what they were on the hook for, they knew what they had done.

Tr. Vol. III (March 9, 2006) at 235-36 (emphasis added).

Plaintiff's counsel also highlighted Dr. Koyawala's report card during his closing, arguing that it "shows the previous death that he was involved and the two other dangerous incidents," including "the one incident where a child needed to be intubated, [but] he couldn't do it. He had to call somebody else in to help him." Tr. Vol. III (March 9, 2006) at 238-39.

Mr. Hayhurst was forced to defend against these prejudicial arguments one final time in his closing argument. In fact, he devoted a significant portion of his allotted time to rebutting these misleading assertions by Plaintiff's counsel. For example, he discussed the privileged witness interview summaries; he disputed the assertion that the Hospital had fraudulently concealed documents by not turning them over until trial; and he attempted again to defend the wisdom of the peer review privilege. Tr. Vol. III (March 10) at 286-88, 295-296.

Plaintiff's counsel, of course, had the last word. He began by again invoking Dr. Koyawala's peer review "report card," but with a brand-new insinuation of wrongful concealment. Because the report card covered only the years from 1999 to 2001, he theorized that the Hospital must somehow be hiding or withholding earlier information:

> And [Mr. Hayhurst] told you, "Oh, there were never any other incidents or variances in all of these years from '94 to 2001." Now, if that were true, don't you think the hospital would have been the first ones to come in here and give you the complete report from '94 all the way through to whenever they say that he finally left in 2002? Of course, they would have. He wasn't somebody who only had these three problems the whole time he was there. This is only one small period. But they want to pull wool over your eyes, they want to tell you that he was cleared all of the time. These things are false.

Tr. Vol. III (March 10, 2006) at 309. What was false was Plaintiff's insinuation. Ms. Carpenter testified without contradiction that the peer review tracking and trending system – which produces the "report cards" – was not even *started* until 1999. Tr. Vol. II (March 6, 2006) at 91. However, because Plaintiff's newfound insinuation was made in rebuttal argument, Camden-Clark had no opportunity to respond to it.

Plaintiff's counsel then hammered these improper suggestions home through the use of the privileged witness interview statements, stating:

> I can't put anything more clear-cut than that before you in terms of the fraudulent concealment. *It's their own documents that say they tell people to*

> *destroy notes*. . . . It's never the right thing to do to destroy the evidence. It's never the right thing to do to tell a nurse to get rid of her notes and then come to court years later and say, "Well, she's probably lying about those notes. We would never tell anybody to destroy anything." *Well, your own documents show that that is what you do*. It's beyond wrong.

Tr. Vol. III (March 10, 2006) at 313-14 (emphasis added). The documents to which Plaintiff's counsel referred are the witness interview summaries prepared by Ms. Johnston, in preparation for litigation, containing her personal thoughts and notes.

v. The Verdict and Judgment

The jury ruled for the defense in just a few particulars, notably that Koyawala and Melvin were not the Hospital's actual agents, and that the Hospital was not negligent in extending credentials to Koyawala. But it found the Hospital (as well as the non-parties Koyawala and Melvin) negligent in the underlying wrongful death claim, and it awarded economic damages of $650,000 and non-economic damages of $920,000. It also held the Hospital liable for both fraudulent concealment and outrage, awarding $100,000 and $375,000 on those claims. Finally, it awarded punitive damages of $3 million against the Hospital and a purported $1.5 million against the absent non-parties, Koyawala and Melvin.

vi. Post-trial Errors by the Circuit Court

The Circuit Court committed at least three significant post-trial errors. First, it erroneously denied Camden-Clark a full setoff of the amount paid in a pretrial settlement by former defendants Dr. Koyawala and UAI. Second, it stated from the bench (though it has not yet ruled in a written order) that the Hospital's post-trial motions were untimely. Finally, the judgment order contains no analysis of the propriety of the punitive damages award, as is required by the state and federal due process clauses. Factual details pertinent to these errors are provided *infra* where the errors are discussed.

III. Assignments of Error

I. The Hospital's post-trial motions were timely. The Circuit Court erred in opining otherwise and in failing to immediately direct the Clerk to correct the civil docket to reflect the actual date of entry of the judgment.

II. The Circuit Court erroneously ordered the production of, and permitted Plaintiff to use, confidential peer review materials statutorily protected from such disclosure.

III. The Circuit Court erroneously ordered the production of, and permitted Plaintiff to use, confidential attorney-client communications and trial preparation materials protected from disclosure by W.Va. R. Civ. P. 26(b)(3).

IV. The Circuit Court permitted Plaintiff to submit an untenable claim of intentional spoliation of evidence to the jury under the guise of claims of outrage and fraudulent concealment.

V. The Circuit Court erroneously permitted the Plaintiff to recover damages for the same injury twice through the use of two legal theories for the same harm.

VI. The tort of outrage cannot lie on these facts, and the Circuit Court erred in submitting the issue to the jury and failing to set aside the jury's verdict.

VII. The tort of fraudulent concealment cannot lie on these facts, and the Circuit Court erred in submitting the issue to the jury and failing to set aside the jury's verdict.

VIII. The instructions and verdict form were erroneous and misleading.

IX. The Circuit Court improperly denied the Hospital a full set-off of the amount paid in a pretrial settlement by former defendants Manish Koyawala and United Anesthesia, Inc.

X. Because all non-economic damages awarded against the Hospital are subject to the applicable Medical Professional Liability Act (MPLA) cap of $1 million, the Circuit Court erred in entering judgment in excess of that cap.

XI. The Circuit Court improperly permitted the jury to award duplicative – indeed triplicative – punitive damages against the Hospital, in violation

of the rule of *Tudor v. Charleston Area Medical Center, Inc.*, 203 W.Va. 111, 506 S.E.2d 554 (1997).

XII. Because the Hospital's conduct did not satisfy the test stated in syllabus point 4 of *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895), the Circuit Court erred in submitting the issue of punitive damages to the jury and failing to set aside the jury's verdict.

XIII. Punitive damages may not be awarded vicariously against the ostensible "principal" of a merely ostensible agent.

XIV. The Circuit Court failed to conduct the post-trial review of the jury's punitive damages award required by the due process clauses of the state and federal constitutions and this Court's decision in *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), and any such review would reveal that the award was constitutionally excessive.

XV. The punitive damages award against the Hospital violates the Hospital's right to substantive due process of law under the state and federal constitutions.

IV. Argument

A. Preliminary Matters

i. Because the Judgment Includes an Award of Punitive Damages, Due Process Requires Full Appellate Review

This petition asks for the Court's review of a substantial assessment of punitive damages,

and the petition can, should, and indeed *must* be granted for that reason alone. Appellate review of an award of punitive damages is an essential component of procedural due process. *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 n.9 (2001) ("[W]e [have] emphasized the importance of appellate review to ensuring that a jury's award of punitive damages comports with due process."). In this regard, this Court has committed itself to "meaningful and adequate" review of every punitive damages award. *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897, 908 (1991); *see Cooper Industries*, 532 U.S. at 443 (due process requires *de novo* review of punitive damages awards). Although the Court has reserved the right to conduct its review on the petition alone, *see* syl. pt. 5, *Garnes*, the Hospital submits that, in light of the United States Supreme Court's subsequent holding in *Cooper Industries*, it is now clear that adequate procedural due process requires the plenary review of a full appeal. Indeed, that Court has since restated and emphasized this point:

> We reiterated the importance of [the *Gore*[20]] guideposts in *Cooper Industries* and *mandated* appellate courts to conduct *de novo* review of a trial court's application of them to the jury's award. Exacting appellate review ensures that an award of punitive damages is based

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[20] *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)

> upon an application of law, rather than a decisionmaker's caprice.

State Farm Mutual Automobile Insurance Co. v. Campbell, 538 S.Ct. 408, 418 (2003) (emphasis added; citations and quotation omitted). Because this Court's denial of a petition for appeal is not even an expression of the Court's view of the merits,[21] such a denial would not fulfill the Court's mandatory duty to perform an "exacting" *de novo* review applying the *Gore* guideposts. Hence, this petition must be granted.

ii. The Hospital's Post-Trial Motions were Timely

During the hearing on the Hospital's post-trial motions, the Circuit Court opined that those motions had been untimely filed. Tr. (Aug. 24, 2006) at 63. As was described above, it is the announcement of this potential (and erroneous) holding that has caused the Hospital to file this petition now notwithstanding the lack of a written order denying those motions.

Rules 50 and 59 each require that a motion pursuant thereto shall be filed no later than ten days after the "*entry* of the judgment." W.Va. R. Civ. P. 50(b), 59(b) (emphasis added). "Entry" of judgment is specifically and clearly defined by the rules: "The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the

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[21] *See In re Nat'l Bank of Wheeling*, 137 W.Va. 673, 73 S.E.2d 655, 667 (1952) (overruled in part on other grounds, *In re Kanawha Valley Bank*, 144 W.Va. 346, 109 S.E.2d 649 (1959)).

judgment; and the judgment is not effective before such entry." W.Va. R. Civ. P. 58 (in pertinent part).

This Court has explained that entry is therefore an event distinct from the mere announcement or rendition of judgment. "There has been some confusion in distinguishing the rendition of the judgment from entry of the judgment. That is, the pronouncement of judgment by the court on one hand as distinguished from the entry of the judgment into the official records." *State v. Mason*, 157 W.Va. 923, 205 S.E.2d 819, 822 (1974). "Entry of an order requires more than the signature endorsement of the adjudicatory official." *Echard v. City of Parkersburg*, 187 W.Va. 350, 419 S.E.2d 14, 16 (1992).[22] The distinction drawn by the rules has important purposes:

> [Courts have] deemed it essential that the judgment be entered in the civil docket before the judgment was final for purposes of appeal.
>
> While this at first blush might appear to be excessively formal, it is obvious on close examination that such a rule is necessary so that parties

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[22] The *Echard* Court observed that were it otherwise, "the signer could sign the order and withhold it from the affected parties until the ... [applicable] appeal period had passed." *Id.* Although that example is the extreme one, the rules are nonetheless clear that any delay between endorsement and entry cannot work to impair rights that arise only upon actual entry.

> may effectively determine rights .... [such as] *the time for appeal and the making of post-judgment motions*.

Mason, 205 S.E.2d at 822 (emphasis added; quotation omitted). Accordingly, "[i]n a proceeding governed by the Rules of Civil Procedure, a judgment rendered in such proceeding is not final and effective until entered by the clerk in the civil docket as provided in Rule 58 and Rule 79(a) of the Rules of Civil Procedure." Syl. pt. 4, *State v. Mason*.

This civil docket is in turn described in Rule 79(a) (emphasis added).

> The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Supreme Court of Appeals, and shall enter therein each civil action to which these rules are made applicable. ... All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. *The entry of an order or judgment shall show the date the entry is made....*

> W.Va. R. Civ. P. 79(a) (in pertinent part; emphasis added).

It is undisputed here that, although the civil docket states that judgment was entered here on April 28, 2006, the docket is incorrect – April 28 is simply the date that the judgment was signed by Judge Waters; it is *not* the date on which the Clerk entered judgment in the manner described by Rules 58 and 79. Instead, according to the undisputed affidavit of Deputy Circuit Clerk Barbara S. Forshey, entry did not occur until Wednesday, May 3, 2006. Forshey Affidavit (Aug. 23, 2006) at ¶ IV.[23] Camden-Clark not only demonstrated this fact to the Court without contradiction, but it also asked the Court pursuant to Rule 60(a) to order the correction the civil docket so that the actual May 3 entry date is reflected therein. Rule 79(a) imposes a ministerial duty on the clerk of court, who "*shall* show the date the entry is made," and the Hospital is therefore plainly entitled to that relief. As of this writing, however, the Circuit Court has not ruled.

In any event, the Hospital's post-trial motions were filed on Tuesday, May 16, 2006, two

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[23] The copies of the judgment that were certified by the Clerk and forwarded to counsel state on their face that they were certified on May 3, which further corroborates Ms. Forshey's sworn statement. In this regard, it bears mention that Rule 77(d) provides that "*[i]mmediately* upon the entry of an order or judgment by the clerk ... shall serve by mail a notice of the entry in the manner provided for in Rule 5 ... and shall make a note of the mailing in the docket." W.Va. R. Civ. P. 77(d) (emphasis added). Clearly the Clerk did so "immediately" here – on May 3.

full days *before* the ten-day period after the May 3 entry.[24] They were therefore timely.

B. Errors Requiring a New Trial

i. The Circuit Court Erroneously Ordered the Production of, and Permitted Plaintiff to Use, Confidential Peer Review Materials Statutorily Protected from Disclosure

Like the federal government[25] and most other states, West Virginia has enacted legislation aimed at improving the quality of health care by encouraging thorough and effective peer review by and for physicians and other health care professionals. *See* W.Va. Code §§ 30-3C-1 through -4. Our statute broadly defines "peer review" as

> the procedure for evaluation by health care professionals of the quality and efficiency of services ordered or performed by other health care professionals, including practice analysis, inpatient hospital and

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[24] May 6 and 13 were Saturdays, May 7 and 14 were Sundays, and May 9 was Election Day. Under W.Va. R. Civ. P. 6(a), none of these days are counted where a "period of time prescribed or allowed by these rules ... is fewer than 11 days[.]" Such a clear and unambiguous rule of civil procedure, like a statute, is not construed, but rather is applied according to its terms. *Mason*, 295 S.E.2d at 823. Because these five days are excluded from the computation of time, the deadline for Camden-Clark's motions was May 18, 2006.

[25] Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152.

> extended care facility utilization review, medical audit, ambulatory care review, claims review and patient safety review.

§ 30-3C-1. The statute next defines a "review organization" as "*any* committee or organization engaging in peer review[.]" *Id.* (emphasis added). Moreover, lest "any" be misunderstood, the Legislature provided a lengthy list of examples of such organizations, many of which are also broadly defined.[26]

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[26] This laundry list includes:

> [A] hospital utilization review committee, a hospital tissue committee, a medical audit committee, a health insurance review committee, a health maintenance organization review committee, hospital, medical, dental and health service corporation review committee, a hospital plan corporation review committee, a professional health service plan review committee or organization, a dental review committee, a physicians' advisory committee, a podiatry advisory committee, a nursing advisory committee, any committee or organization established pursuant to a medical assistance program, the joint commission on accreditation of health care organizations or similar accrediting body or any entity established by such accrediting body or to fulfill the requirements of such accrediting body, any entity established pursuant to state or federal law for peer review purposes, and any committee established by one or more state or local professional societies or institutes, to gather and review information relating to the care and treatment of patients for the purposes of: (i) Evaluating and improving the quality of

Having defined the subject and the players, the Legislature turned to fostering vigorous and constructive peer review. Its approach was two-fold: immunity and confidentiality. Immunity is treated in § 30-3C-2, but it is of no moment here. The statute's confidentiality provision is, however, very much at issue, and the Hospital submits that the Circuit Court plainly ran afoul of it. The statute commands as follows:

> *The proceedings and records of a review organization shall be confidential and privileged and shall not be subject to subpoena or discovery proceedings or be admitted as evidence in any civil action arising out of the matters which are subject to evaluation and review by such organization* and no person who was in attendance at a meeting of such organization shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during

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health care rendered; (ii) reducing morbidity or mortality; or (iii) establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care. It shall also mean any hospital board committee or organization reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto, and any professional standards review organizations established or required under state or federal statutes or regulations.

W.Va. Code § 30-3C-1.

> the proceedings of such organization or as to any findings, recommendations, evaluations, opinions or other actions of such organization or any members thereof: Provided, That information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action merely because they were presented during proceedings of such organization, nor should any person who testifies before such organization or who is a member of such organization be prevented from testifying as to matters within his knowledge, but the witness shall not be asked about his testimony before such an organization or opinions formed by him as a result of such organization hearings: Provided, however, That an individual may execute a valid waiver authorizing the release of the contents of his file pertaining to his own acts or omissions, and such waiver shall remove the confidentiality and privilege of said contents otherwise provided by this section[.]

W.Va. Code § 30-3C-3 (in relevant part).

> This confidentiality provision is essential to the Legislature's aims:
> [I]t seems evident that the legislature enacted these provisions with the

> ultimate purpose of improving the quality of medical care provided in the hospitals of this State. The confidentiality provision was undoubtedly placed in the peer review law for the same reason that most other states have created some type of privilege protecting peer review proceedings from disclosure.

Daily Gazette Co. v. West Virginia Bd. of Med., 177 W.Va. 316, 352 S.E.2d 66, 71-72 (1986).

Moreover, the Legislature chose peer review confidentiality knowing full well that evidence potentially helpful to demonstrate professional negligence by a provider would remain hidden from injured patients and the courts. "'[T]he purpose of this legislation is not to facilitate the prosecution of malpractice cases. Rather, its purpose is to ensure the effectiveness of professional self-evaluation, by members of the medical profession, in the interest of improving the quality of health care.'" *Daily Gazette*, 352 S.E.2d at 72 (quoting *Jenkins v. Wu*, 102 Ill.2d 468, 468 N.E.2d 1162, 1168-1169 (1984)). "The peer review privilege represents a legislative choice between medical staff candor and the public's access to evidence." *State ex rel. Shroades v. Henry*, 187 W.Va. 723, 421 S.E.2d 264, 268 (1992). And that choice was the Legislature's to make.

Although this Court does not sit to review the wisdom of this statute, the Legislature's reasoning is clear, persuasive, and good public

health policy. This Court has already so recognized. "'Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.'" *Daily Gazette*, 352 S.E.2d at 72 n.12 (quoting *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970)).

One other important feature of peer review confidentiality bears mention here. The Hospital is not merely *empowered* to hold peer review materials confidential, it is *obligated* to do so.

> To effect a waiver of the privilege of confidentiality which attends information and records properly the subject of health care peer review under West Virginia Code §§ 30-3C-1 to -3 (1993), the Legislature has required that an *individual* must formally indicate his intent to waive this confidentiality by executing a valid waiver.

Syl. pt. 3, *Young v. Saldanha*, 189 W.Va. 330, 431 S.E.2d 669 (1993) (emphasis added). Hence, the Hospital is powerless to waive the privilege of confidentiality as regards the peer review of a given medical professional. Only the individual who is the subject of the review may do that.

Much of the Circuit Court's confusion in this case appears to have arisen from the statute's proviso that mere submission of a document to a

review organization does not render it privileged if it otherwise is available from a non-privileged "original source." This Court has observed that generally "the origin of the document determines if it is privileged." *Shroades*, 421 S.E.2d at 269 (footnote omitted). In many or most cases, this observation is quite true. Review organizations often examine ordinary medical and other records that are created not by or for the organization, but for entirely independent purposes.

But documents that have no such independent purpose – *i.e.* documents created *for* the use of a review organization – are privileged even when they are not created *by* the organization itself. This principle is well illustrated by *State ex rel. Charles Town General Hospital v. Sanders*, 210 W.Va. 118, 556 S.E.2d 85 (2001). In *Charles Town General*, the question presented was whether documents generated during credentialing, including applications for issuance or renewal of staff privileges, were subject to the statutory privilege.[27]

This Court readily concluded that a staff credentialing committee is a "review organization" under the broad statutory definition. 556 S.E.2d at 92. Accordingly, the statutory privilege clearly shielded documents generated internally by the committee. More "problematic" for the Court, however, were the applications for privileges themselves. These were, of course, created by the applicants rather than the

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[27] The Court expressly observed that it had not considered this question in deciding *Shroades*.

credentialing committee. On the other hand, they "*would not have been created but for the hospital's review organization* ... whose original records are, in fact, entitled to the statutory privilege." 556 S.E.2d at 93 (emphasis added).

The purpose of the documents was the deciding factor. Because the applications were created in order to be peer-reviewed, this Court was persuaded that logically they must share the privilege as well.

> [I]t would be incongruous to find that applications for staff privileges or the renewal thereof are not protected by the peer review privilege simply because they are created by individuals who are not, themselves, members of the hospital's credentialing committee. Rather these applications are as integral a part of the hospital review organization's proceedings as are those records generated exclusively during the committee's consideration of the subject documents, and indeed, perhaps even more crucial since the applications, themselves, often provide the starting point for the committee's deliberations.

Charles Town Gen. Hosp., 556 S.E.2d at 93. Hence, the Court upheld the privilege as regards the applications, and it fashioned this syllabus point:

> An application for the issuance or renewal of staff privileges that is created solely for consideration by a hospital credentialing committee is protected by the health care peer review privilege pursuant to W.Va. Code § 30-3C-1 (1980) (Repl. Vol. 1998).

Syl. pt. 8, *id.*

Though the immediate context of this holding involved applications for privileges, its reasoning surely governs here. Documents that are created and exist only because they are needed or useful for peer review are privileged. The "original source" proviso does not reach them. Hence, documents such as the handwritten accounts written by employees at Ms. Carpenter's request for the root cause analysis are confidential peer review documents.

Moreover, and at any rate, much of the confidential material disclosed to Plaintiff plainly originated within the peer review process itself and could not even arguably be deemed to be within the "original source" proviso. For example, Dr. Koyawala's "report card" is a core peer review document; the root cause analysis meeting notes are as well.

In closing, this Court's words from *Daily Gazette Co.* bear repeating: "[T]he purpose of this [peer review] legislation is not to facilitate the prosecution of malpractice cases." 352 S.E.2d at 72 (quotation omitted). Here, peer review materials did

much more than merely "facilitate" Plaintiff's case; they largely became his case, and the Hospital's good-faith attempts to obey the statute brought a seven-figure liability upon it. The judgment must be reversed for this reason alone.

ii. The Circuit Court Erroneously Ordered the Production of, and Permitted Plaintiff to Use, Attorney-Client Communications and Trial Preparation Materials Protected from Disclosure by Rule 26(b)(3)

In addition to permitting the invasion of private peer review documents, the Circuit Court also erred when it ordered the production of materials prepared by or under the purview of Sherry Johnston. Ms. Johnston is the Hospital's Director of Risk Management. She reports to its general counsel, Todd Kruger, and she undertook an investigation of Mrs. Boggs' surgery and death at the direction of both Mr. Kruger and outside counsel when the prospect of litigation arose.[28] Tr. (August 3, 2005) at 7-8. In the course of her investigation, Ms. Johnston interviewed witnesses and drafted summaries of these interviews, which included her analysis and impressions gleaned from the interviews, expressly to assist the Hospital's lawyers in assessing and managing the litigation. Tr. (August 3, 2005) at 10-11 ("Mr. Hayhurst: ... Mrs. Johnston has interviewed witnesses and put down her own mental thoughts and impressions for the purpose of communicating the relevant information

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[28] This prospect arose very quickly. As was noted above, the Boggs family was represented by counsel within two or three days of the surgery. Tr. Vol. II (March 8, 2006) at 347.

that those witnesses imparted to me so that I may assess the hospital's position.").

Under these circumstances, the documents prepared by or for Ms. Johnston were protected from disclosure under the attorney-client privilege, W.Va. Civ. P. 26(b)(3), or both. The Circuit Court's holding otherwise rested on the erroneous premise that only the Hospital's outside lawyer, or direct agents of that outside lawyer, could create protected trial preparation materials. Simply because Ms. Johnston is an employee of the Hospital, the Circuit Court held that the materials were not protected. Tr. (August 3, 2005) at 24 ("The Court: ... I do not believe work done by Ms. Johnston, a hospital employee, would be considered work product."); Order (August 3, 2005) at 3 ("Questions Sherry Johnston was asked regarding her investigation into what happened to Mrs. Boggs are proper and do not infringe on the work-product exception to discovery. The Court finds that Mrs. Johnston is not an employee of the Hospital's counsel[.]"). The Court erred.

First, and most simply, many of the summaries are on their face communications from Ms. Johnston, on behalf of the Hospital, to Mr. Hayhurst. Organizations can communicate with lawyers only through agents authorized to do so, and Ms. Johnston was clearly such an authorized person. Hence, the communications should be and are shielded by the attorney-client privilege. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981).

Second, the protections of Rule 26(b)(3) plainly embrace all materials created by or for a *party*, and not just a party's lawyer:

> Trial preparation: materials. – Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another *party* or by or for that other *party*'s representative (including the *party's* attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

W.Va. R. Civ. P. 26(b)(3) (in relevant part; emphasis added).

This rule makes good sense. It is of course commonplace for a party facing the prospect

of litigation to prepare to meet that prospect. When that party is an organization, its lawyer – in-house or outside – almost always needs the assistance of employees of the organization to help him or her investigate, gather information, and develop a plan of action. During the ensuing lawsuit, employees of the party may again be called upon to assist with developing or responding to discovery, to provide information necessary to the lawyer's strategic and tactical decisions, and to perform such diverse other tasks as may arise in the modern lawsuit. The rules of civil procedure have evolved to recognize this reality and to protect the work product that is thereby generated. This Court so stated over twenty years ago:

> Rule 26(b)(3) of the West Virginia Rules of Civil Procedure is identical to the federal rule, which was adopted in 1970 as part of a larger reorganization of the discovery section of the Federal Rules of Civil Procedure. The purpose of Rule 26(b)(3) is to narrow the ability to obtain trial preparation materials *by expanding the coverage of the work product rule to include persons other than an attorney.*

Syl. pt. 6, *In re Markle*, 174 W.Va. 550, 328 S.E.2d 157 (1985) (holding that report prepared by employee of the Judicial Investigation Committee, which consisted of summaries of interviews with nine witnesses, was entitled to protection under Rule 26(b)(3)); *see also id.*, 328 S.E.2d at 163 (collecting federal cases extending work product or Rule

26(b)(3) protection to investigators, a physician, accountants, economists, a foreign patent agent, and marine surveyors).[29]

Hence, whether Ms. Johnston was a Hospital employee or an agent of outside counsel was a question of no consequence. In either capacity, she could create party work product protected by Rule 26(b)(3), as indeed could a far broader class of persons of whom she is just one example.

Accordingly, the only remaining inquiry is whether the documents were prepared in anticipation of litigation. This Court has described the inquiry as follows:

> To determine whether a document was prepared in anticipation of litigation and, is therefore, protected from

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[29] Because the language of the state and federal rules is identical, this Court gives "due consideration" to analogous federal case law. *State ex rel. United Hosp. Ctr. v.Bedell*, 199 W.Va. 316, 484 S.E.2d at 210 n.15. The federal courts clearly read Rule 26(b)(3) as expansively as it is written. "For purposes of the rule, it is irrelevant whether [the document preparer] was retained by defendant's attorneys, as defendant alleges, or by defendant, as plaintiff contends. Work product protection, if applicable here, lies in favor of the party, its lawyers and agents." *Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 708 (S.D.N.Y. 1979); *see Bunting v. Gainsville Mach. Co.*, 53 F.R.D. 594 (D. Del 1971) (observing that Rule 26(b)(3)'s protection is "intended to encompass documents prepared by a *party* or someone acting on *its* behalf to aid that *party* in the litigation") (emphasis added); *see generally* Wright, Miller, & Marcus, Fed. Prac. & Proc. Civ.2d § 2024.

> disclosure under the work product doctrine, the primary motivating purpose behind the creation of the document must have been to assist in pending or probable future litigation.

Syl. pt. 7, *State ex rel. United Hosp. Ctr., Inc. v. Bedell*, 199 W.Va. 316, 484 S.E.2d 199 (1997); *see id.*, 484 S.E.2d at 213-214 (holding that investigative report prepared by in-house counsel after incident involving injuries to elderly patient was subject to work product immunity where counsel "conducted the investigation primarily out of concern for the hospital's exposure to liability"). The answer to this question is easy – the prospect of litigation was not merely the "primary," but indeed the *only*, reason that the documents were prepared at all.

That answer should end the inquiry with a finding that the documents are protected. The Hospital must, however, point out that the protected documents put to most prejudicial use by Plaintiff were the quintessential example of protected work product – notes of statements taken from available witnesses. Indeed, the narrower common-law work product doctrine had its very genesis in a case involving witness statements. *See Hickman v. Taylor*, 329 U.S. 495 (1947). This Court's *Markle* decision, in which the breadth of modern Rule 26(b)(3) was emphasized, involved such statements as well.

Moreover, proper application of the law would have caused no unfair prejudice to Plaintiff. Interviewing a witness obviously does not render her

identity secret or immunize her from repeating her recollections under oath. All witnesses were identified for Plaintiff, and he deposed all those he wished to depose. There was simply no justification for permitting him to also invade and inspect the Hospital's confidential legal files.

In the end, the trial court's rulings punished the Hospital for doing what anyone concerned about potential litigation ought to do – investigate the facts. By then permitting the Hospital's reasonable and lawful withholding of its trial preparation materials to be painted as some sort of fraud or cover-up – indeed as a ground for the award of damages – the Court allowed this prejudice to become especially severe.

iii. Plaintiff Should Not Have Been Permitted to Merge an Untenable Spoliation of Evidence Claim into his Claims for Outrage and Fraudulent Concealment

In *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003), this Court first recognized an independent tort for spoliation of evidence, subject to various limitations therein described. The new cause of action will lie against a party to a lawsuit if spoliation is intentional and the following elements are present:

> (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) *the spoliated evidence was vital to a party's*

> *ability to prevail* in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) *the party's inability to prevail in the civil action*; and (7) damages.

Syl. pt. 11, *id.* (emphasis added).

Plaintiff pled a spoliation claim here, but, at the close of the evidence, he chose not to ask that it be submitted to the jury. There is little mystery about this choice; otherwise, because of the materiality elements emphasized above, he would have had to argue to the jury that he could not win his primary claims.[30]

Nonetheless, in support of his other claims, Plaintiff proceeded to argue that the Hospital had tampered with or destroyed evidence. These arguments were unfair and prejudicial. In *Hannah*, this Court recognized a particular tort and gave it specific contours and circumscriptions. Plaintiffs' arguments permitted him to ignore the boundaries set by the Court and to recover damages for spoliation without establishing the materiality elements required by law.

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[30] A second very good reason for Plaintiff to have dropped this claim is that it had no factual basis. With the possible exception of notes allegedly prepared by Bernice Burns (of which the Hospital has no knowledge), everything that Plaintiff accused the Hospital of "destroying" was quite extant, in Plaintiff's possession, and used by him at trial.

iv. The Verdicts for Outrage and Fraudulent Concealment Constitute a Double Recovery

"'A plaintiff may not recover damages twice for the same injury simply because he has two legal theories[.]'" *Harless v. First Nat'l Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d 692, 705 (1982).

Plaintiff could draw no material distinction between the alleged conduct underlying his claims of fraudulent concealment and outrage. Consider the following excerpts from his counsel's closing argument:

> The Hospital fraudulently concealed the truth about what happened to Mrs. Boggs by telling nurses to destroy notes, by giving the Boggs family a record that didn't tell the true story about what happened, by hiding documents right up until the trial was going on in this case, and by basically going along with Dr. Koyawala's plan to tell the same story or there was going to be trouble in this case.

Tr. (3/9-3/10/06) at 222-223.

> I think this conduct is outrageous. To tamper with medical records, to mislead the family about the dreadful circumstances of what happened to Mrs. Boggs is outrageous. No person should be lied to and deceived about

> what happened to their loved one when they passed away under circumstances like this. It is beyond all possible bounds of decency to do that.

Id. at 234-235. The Hospital respectfully submits that a review of the record will demonstrate to the Court that these excerpts are characteristic of Plaintiff's argument and position below.[31] His claims were duplicative, and he should not have been awarded damages twice for the same injury.

v. The Claim of Fraudulent Concealment Rests on Inadmissible and Irrelevant Evidence and Must Be Reversed

The judgment on Plaintiff's claim for fraudulent concealment is infirm and must be reversed, for several distinct reasons.

First of all, this claim largely rested on the very evidence that the Circuit Court erroneously permitted Plaintiff to have and use: documents protected from disclosure by Rule 26(b)(3) and/or the statutory peer review privilege. As is discussed above, the Hospital should not have been required to disclose these documents, and it cannot be tortious – let alone fraudulent – for a party to conceal what it

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[31] At the close of evidence and in response to the Hospital's motion for a directed verdict on the outrage claim, Plaintiff's counsel directly equated that claim with the alleged fraudulent concealment, stating: "Not giving this family the facts about what happened to Mrs. Boggs is along the same lines, Your Honor. I certainly think that rises to the tort of outrage level." Tr. Vol. III (March 9, 2006) at 161.

has every right to conceal. Moreover, even if the Hospital were wrong as regards some of its assertions of privilege or right of nondisclosure, its positions were taken on what is plainly a nonfrivolous construction and application of the law. Any such errors are remediable through the rules of civil procedure, but they are not torts.

Second, the Hospital's positions on privilege issues were taken during the litigation itself, which exposes another flaw in Plaintiff's fraudulent concealment claim. "A cause of action must be based on facts that exist prior to the institution of the action." *Harless*, 289 S.E.2d at 696 n.6. The proper procedural vehicle for a plaintiff who wishes to rely on post-complaint transactions, occurrences, or events is a supplemental complaint under W.Va. R. Civ. P. 15(d). *See* syl. pt. 3, *Jones v. Jones*, 184 W.Va. 297, 400 S.E.2d 305 (1990). No supplemental complaint appears here, and consequently Plaintiff should not have been permitted to rely on these matters at trial.

Third, because Plaintiff could not prove an affirmative fraud based on an actual misrepresentation, he resorted to a claim of fraudulent concealment. But one charging another with fraudulent concealment must demonstrate an affirmative duty for the other party to speak in the first place. *See Trafalgar House Const., Inc. v. ZMM, Inc.*, 211 W.Va. 578, 567 S.E.2d 294, 300 (2002) ("Fraudulent concealment involves the concealment of facts by one with knowledge or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud." (citing *Silva v.*

Stevens, 156 Vt. 94, 589 A.2d 852, 857 (1991)). Silence is not a tort absent such a duty. *See Pocahontas Mining Co. Ltd. Partnership v. Oxy USA, Inc.*, 202 W.Va. 169, 503 S.E.2d 258, 264 (1998) (Workman, J., concurring) ("The law states that in order for silence to be an actionable fraud, facts must be averred which give rise to a duty to speak." (quoting *Jim Walter Homes, Inc. v. Waldrop*, 448 So.2d 301, 306 (Ala. 1983)).

In this case, Plaintiff cited no law and introduced no evidence demonstrating that the Hospital had any such affirmative duty. To the contrary, the record shows that Mrs. Boggs' attending physicians bore the duty and responsibility of advising the family regarding her condition and treatment. Tr. Vol. III (March 9, 2006) at 123. In fact, a hospital risks inappropriately interfering in the physician-patient relationship if it undertakes to bypass the physician and disclose information on its own initiative. Tr. Vol. III (March 9, 2006) at 123-126; *cf. Cross*, 294 S.E.2d at 459 (the informed consent process is between physician and patient, and it "could easily be disrupted rather than facilitated by the involvement of hospital personnel").

Notwithstanding the lack of a duty to speak, the Hospital did much to assure that the Boggs family got the information it wanted. It accommodated meetings with Mrs. Boggs' caregivers, one of which was taped and transcribed. Tr. Vol. II (March 8, 2006) at 347-48. Against its usual policy, it provided the family with a copy of her "open" (*i.e.* still-incomplete) medical record, as well

as a complete copy of the final record. Tr. Vol. II (March 6, 2006) at 32, 39-41; Vol. II (March 8, 2006) at 354, 357. Indeed, Mr. Boggs identified no specific instance in which the Hospital denied one of his requests in that regard. *Id.*

The fraudulent concealment claim should not have gone to the jury, and the verdict and judgment adverse to the Hospital must be reversed.

vi. The Tort of Outrage Cannot Lie as a Matter of Law

The Circuit Court also erred in submitting the issue of the tort of outrage to the jury, and for failing to set aside the resulting verdict against the Hospital on that claim. Again, the judgment on this claim should be reversed for reasons already discussed, because it was based largely on the Hospital's lawful withholding of privileged and protected documents.[32] Again, it rested on post-complaint events without any

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[32] This Court has held that the merit of an actor's underlying position would protect it from a claim of outrage even if the elements of that tort were otherwise present:

> Conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable when he has done nothing more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.

Syl. pt. 3, *Dzinglski v. Weirton Steel Corp.*, 191 W.Va. 278, 445 S.E.2d 219 (1994).

supplemental complaint. Third, as was also discussed above, Plaintiff relied on the same allegations and sought the same damages for outrage and fraudulent concealment, and he is not entitled to a double recovery because he has two legal theories.

On a more fundamental level, though, there could never have been a viable claim of outrage on these facts. Inasmuch as no physical injury is required in order to state a claim, "the tort of outrage is a slippery beast, which can easily get out of hand without firm judicial oversight." *Keyes v. Keyes*, 182 W.Va. 802, 392 S.E.2d 693, 696 (1990). The Hospital respectfully submits that the beast slipped very far afield here. A review of the law will quickly show why.

The tort of outrage (a/k/a intentional infliction of emotional distress) requires proof of four elements:

> (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) that the emotional distress suffered by the plaintiff was so severe that no

> reasonable person could be expected to endure it.

Syl. pt. 3 (in part), *Travis v. Alcon Labs., Inc.*, 202 W. Va. 369, 504 S.E.2d 419 (1998).

The first of these elements sets "a high standard indeed"[33]:

> "It [is not] enough that the defendant has acted with an intent which is tortious or even criminal, or that he intended to inflict emotional distress, r even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. *Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.*"

Tanner v. Rite Aid of West Virginia, Inc., 194 W.Va. 643, 461 S.E.2d 149, 156-157 (1995) (emphasis added by the Court; quoting Restatement (Second) of Torts § 46, comment (d)).

Such "*unprecedented* and extreme misconduct"[34] – transgressing as it must the

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[33] *Keyes*, 392 S.E.2d at 696.

[34] *Tanner*, 461 S.E.2d at 157 (emphasis added).

outermost tolerance of civilized society – should rarely occur, and this Court has made clear that the tort will not be expanded beyond those few rare atrocities. *See, e.g., Hosaflook v. Consolidation Coal Co.*, 201 W.Va. 325, 497 S.E.2d 174 (1997) (termination of employee who was progressively going blind may have been "unkind," but it did not "as a matter of law support a claim for the tort of outrage); *Johnson v. Hills Dep't Stores, Inc.*, 200 W.Va. 196, 488 S.E.2d 471, 475-476 (1997) (four-year-old could not recover for emotional distress suffered while watching her mother be rudely interrogated by store personnel concerning suspected shoplifting – "rudeness is not in itself sufficient to meet the elements of outrage"); *Hines v. Hills Dep't Stores, Inc.*, 193 W.Va. 91, 454 S.E.2d 385 (1994) (store did not commit tort of outrage by bringing misdemeanor charges against employees who took advantage of computer error to buy goods at far below the intended price); *Dzinglski v. Weirton Steel Corp.*, 191 W.Va. 278, 445 S.E.2d 219 (1994) (management employee was subjected to thorough investigation of alleged improprieties, and later discharged; investigation could not "conceivably" constitute outrageous conduct); *Keyes*, 392 S.E.2d at 695-697 (surviving family's bickering over decedent's funeral, obituary, and estate, even though it was "deliberate, hateful-minded, [and] pretty mean conduct," was not "utterly intolerable in a civilized community" and hence was not actionable); *Wayne County Bank v. Hodges*, 175 W.Va. 723, 338 S.E.2d 202, 205 (1985) (bank did not commit tort of outrage by using an affidavit containing incorrect information to obtain an attachment on funds on deposit in another bank).

Perhaps most instructive of all is *Williamson v. Harden*, 214 W.Va. 77, 585 S.E.2d 369 (2003) (per curiam), in which this Court affirmed dismissal of a claim of outrage that arose from allegedly false in-court testimony by a witness in a prior case. This Court observed that "[t]he court system simply could not function if it permitted a losing party to sue an adverse witness for the tort of outrage simply because the losing party feels the witness testified falsely or inaccurately." 585 S.E.2d at 374. The Hospital respectfully submits that making claims of privilege for certain documents – even if they were incorrect or baseless (and the Hospital's were not) – cannot possibly be more "outrageous" than giving false testimony. The courts have ample tools to deal with such things, but the tort of outrage simply is not one of them.

In short, Plaintiff did not prove – and could not have proved – that the Hospital engaged in conduct so utterly uncivilized and "outside the bounds of decency" as to permit recovery for the tort of outrage. Although that shortcoming standing alone is enough to defeat the claim, the Hospital submits that none of the other elements of the claim were present here either. In particular, the Hospital must point out that there was no evidence that it had any *intent* to cause Mr. Boggs severe emotional distress, or that it recklessly disregarded the certainty of causing such distress. Although there can be no doubt that his wife's death grieved him, that grief is accounted for in the wrongful death

verdict.[35] There is also simply no evidence of unendurably severe emotional distress caused by the alleged misconduct Plaintiff cites in support of his claim of outrage.

Camden-Clark's operation of a community hospital makes the Parkersburg area a better place, and not a less civilized one. Even if a reasonable jury might find that its conduct in this case was not above reproach, there is no evidence that could justify a verdict against it for the truly extraordinary tort of outrage. The question should not have been submitted to the jury in the first place, and the verdict and award of damages must be set aside.

vii. Errors in Instructions and the Verdict Form Require Reversal

For the reasons stated and described *supra* at 21-26, the Hospital respectfully submits that the instructions misstated the grounds upon which it could be legally responsible for the conduct of Dr. Koyawala or CRNA Melvin, and that the verdict form's submission of the question of punitive damages against non-parties was both error in its own right and led to the error next discussed.

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[35] That grief is also clearly subject to the MPLA's cap on damages for noneconomic loss.

C. Errors Concerning Damages

i. The Circuit Court Failed to Grant the Hospital the Full Benefit of a Prior Settlement Made by Plaintiff with Dr. Koyawala and United Anesthesia

This Court has a "traditional practice of granting a nonsettling defendant a *pro tanto*, or dollar for dollar, credit for partial settlements against any verdict ultimately rendered for the plaintiff." *Bd. of Educ. of McDowell Co. v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990). This practice "furthers the strong public policy against the plaintiff recovering more than one complete satisfaction." *Id.* The Circuit Court did not follow this Court's traditional practice, and in so doing it erred.

The genesis of the error lay in the verdict form. Although, by the time of trial, Plaintiff had settled his claims against Dr. Koyawala, and notwithstanding that Evelyn Melvin had never been a defendant in the first place, the verdict form submitted the question of punitive damages against them: "Do you find that the negligence of Dr. Koyawala or Evelyn Melvin was so excessive, reckless or aggravated that punitive damages should be awarded?" The jury answered in the affirmative and, in the next question on the form, the jury "award[ed]" $1.5 million in such damages "against Dr. Koyawala or Evelyn Melvin."

But of course the jury had no power to award anything against a dismissed party, much

less a non-party. Neither Koyawala nor Melvin can be made to pay the "award."[36] Nonetheless, this phantom liability wound up making a very big difference in the judgment, because the Circuit Court used it to *reduce* the credit to which the Hospital was entitled for the partial settlement. Held the Court: "That award arises out of the conduct of Dr. Koyawala or Evelyn Melvin and is, thus, appropriately offset by $1,500,000.00 of the $2,000,000.00 credit from the settlement proceeds previously paid on behalf of Dr. Koyawala and United Anesthesia, Inc." Journal Order and Judgment Entry at 9.

By denying the Hospital its full credit, the Court in effect required the Hospital to pay the so-called $1.5 million "award," notwithstanding that, as the Court noted, it arose "out of the conduct of Dr. Koyawala or Evelyn Melvin[,]" and notwithstanding that, in a separate finding, the jury had already awarded the prodigious sum of $3 million in punitive damages against the Hospital.

To reiterate: Koyawala settled the claims against him before trial. Melvin was not a defendant at all. The Hospital was the only defendant at trial, and this Court's longstanding law

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[36] Just who would be liable for it if Koyawala and Melvin were parties is unclear, inasmuch as the "award" is stated in the disjunctive and improperly combines the separate questions of the individual punishment appropriate to a given defendant. *See Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114, 119 (1996) (holding that a punitive damages award is an individual liability based on the defendant's own misconduct).

entitled it to a full set-off against all of the compensatory damages awarded against it. *See* syl. pt. 1, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).

Thus, the Circuit Court erred in setting off a pretrial settlement against a fictional "verdict" against non-parties. Any such "settlement is to be credited against any *judgment* rendered against other joint tortfeasors." *Charles v. State Farm Mut. Auto. Ins. Co.*, 192 W.Va. 293, 452 S.E.2d 384, 390 (1994) (emphasis added). There was not, and could not have been, any *judgment* rendered against Koyawala or Melvin. Only the Hospital faces a judgment; only the Hospital is entitled to the benefit of the set-off – all of it.

ii. All Non-Economic Damages Recovered by Plaintiff are Subject to the Limits Prescribed by the Medical Professional Liability Act

On July 1, 2003, important amendments to the Medical Professional Liability Act ("MPLA") went into effect. One that was of particular importance here transformed a statutory cap on "damages for noneconomic loss," previously $1,000,000, into a cap on "compensatory damages for noneconomic loss" set at $250,000 for most actions, but at $500,000 as to liability for wrongful death or certain other serious permanent injuries. W.Va. Code § 55-7B-8.

This case was filed on June 29, 2003, two days before the change in the law, and it was initially dismissed by the Circuit Court because of

Plaintiff's failure to comply with the pre-suit notice requirements of the MPLA. Plaintiff promptly refiled a virtually identical action, while simultaneously appealing the dismissal. On appeal, this Court recognized that the only practical effect of its decision would be which version of the statute applied. *Boggs v. Camden-Clark Mem. Hosp. Corp.*, 216 W.Va. 656, 609 S.E.2d 917, 920 (2004). The Court held that Plaintiff should have been permitted to amend his complaint, and "the changes made to the MPLA as of July 1, 2003, do not apply to appellant's case." *Id.* at 923.

Then, in what the Court itself recognized were *dicta*,[37] it criticized the Circuit Court's holding that all of Plaintiff's claims were subject to the MPLA. The Court fashioned a syllabus point on the subject,[38] and stated in the text of its opinion that intentional torts were *per se* outside of the MPLA's purview. *Id.* at 924.

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[37] "[O]ur reversal of the lower court's dismissal makes consideration of the appellant's other arguments unnecessary[.]" 609 S.E.2d at 923.

[38] The West Virginia Medical Professional Liability Act, codified at W.Va. Code § 55-7B-1 *et seq.*, applies only to claims resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability.

Syl. pt. 3, *Boggs*.

Within a year, however, the Court retreated from these *dicta*. *Gray v. Mena* presented a case in which the plaintiff-patient alleged that she had been sexually assaulted during an examination performed by the defendant doctor. She contended that she need not comply with the MPLA because her claim as pled was an intentional tort. This Court held that, although her legal position could be taken in good faith, the defendant was entitled to require her to comply with the MPLA, and it ordered the Circuit Court on remand to require such compliance. *Gray v. Mena*, 218 W.Va. 564, 625 S.E.2d 326, 332 (2005). In so doing, the Court clarified *Boggs* by acknowledging that the MPLA does *not* exclude intentional torts from its purview.

> This Court's opinion in *Boggs v. Camden-Clark Memorial Hospital Corp.*, 216 W.Va. 656, 609 S.E.2d 917 (2004), is clarified by recognizing that the West Virginia Legislature's definition of medical professional liability, found in West Virginia Code § 55-7B-2(i) (Supp. 2005), includes liability for damages resulting from the death or injury of a person for *any* tort based upon health care services rendered or which should have been rendered. To the extent that *Boggs* suggested otherwise, it is modified.

Syl. pt. 4, *Gray*.

Given the modification to the Court's opinion, the Hospital respectfully submits that all of the non-economic damages awarded against it are subject to the statutory cap.[39] Certainly if some alleged *sexual assaults* can fall within the statute's definition of "medical professional liability," so then can even the worst misconduct alleged by Plaintiff here.

Moreover, the duties Plaintiff contended he was owed all arose from the provision of health care services to Mrs. Boggs. If the Hospital had a duty to speak (it did not) that could give rise to a claim for fraudulent concealment, that duty could only have arisen from Mrs. Boggs' hospitalization and surgery. If the Hospital behaved in an atrocious and uncivilized manner (it did not), its actions

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[39] This position extends to the award of punitive damages against the Hospital. In so arguing, the Hospital first acknowledges and concedes that "noneconomic loss" would not ordinarily refer to punitive damages, because punitive damages are awarded not on account of the plaintiff's *loss*, but because of the egregiousness of the defendant's conduct. *Burgess*, 469 S.E.2d at 119.

Here, however, the Court is construing a statute, and so the intent of the Legislature is the guiding star. A strong indicator of that intent is in the 2003 amendments to the MPLA. After those amendments, the statutory cap now applies to "*compensatory* damages for noneconomic loss." W.Va. Code § 55-7B-8. The prior version applied only to "damages for noneconomic loss," without the limiting adjective "compensatory." Former W.Va. Code § 55-7B-8 (2002). If this change is to mean anything – and this Court ought not presume that the Legislature has performed a vain act – then the version of the MPLA applicable to this case capped compensatory as well as punitive damages.

nonetheless involved core health care functions such as peer review and maintenance of medical records.

In sum, all of the non-economic damages awarded to Plaintiff were subject to the statutory cap stated in W.Va. Code § 55-7B-8 (2002), and the Circuit Court erred in holding otherwise.

iii. The Hospital Cannot be Vicariously Liable for Punitive Damages Awarded Against a Mere Ostensible Agent

Below, Plaintiff argued that the denial of a full set-off of the co-defendant settlement is appropriate because the Hospital should be liable vicariously for the punitive damages "awarded" against Koyawala or Melvin. *See, e.g.*, Plaintiff, Bernard Boggs', Memorandum in Opposition to Defendant's First Amended Motion to Alter of Amend Judgment Order (Aug. 17, 2006) at 8-10. This contention has at least two fundamental flaws.

First, even *if* the anesthesia team had been the Hospital's actual agents, liability for punitive damages for an agent's acts does not flow automatically and vicariously to a principal. This Court requires more:

> [An employer] cannot be made responsible for exemplary damages on account of injuries done by one of its servants, even though the act was wanton and malicious, unless the act was expressly or impliedly authorized or ratified by the company.

Syl. pt. 4, *Ricketts v. Chesapeake & Ohio Ry. Co.* 33 W.Va. 433, 10 S.E. 801 (1890); *see Jarvis v. Modern Woodmen of America*, 185 W.Va. 305, 406 S.E.2d 736, 743 (1991) (applying *Ricketts* and affirming jury finding that principal did authorize or ratify agent's conduct). This Court's view is in the mainstream. "The common law has long recognized that agency principles limit vicarious liability for punitive damages. This is a principle, moreover, that [the United States Supreme] Court historically has endorsed." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 541 (1999) (citations omitted).

Because the Circuit Court rejected the Hospital's proffered instruction (*see supra* at 23-24 & n.17), the jury in this case was not even asked to make the findings necessary to satisfy the *Ricketts* test. Hence, there could not be vicarious liability for punitive damages here even if the relationship between the Hospital and the anesthesia team were sufficient to permit it, and that relationship was most *in*sufficient.

Why? Because the *Ricketts* rule itself presupposes an *actual* agency – a status the jury specifically found *did not exist* here. Apparent agents may render their apparent principals liable for compensatory damages,[40] but to *punish* someone for the acts of someone he has not actually authorized to act is something the law does not countenance.

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[40] Effective with the 2003 amendments to W.Va. Code § 55-7B-9(g), however, the Legislature effectively abolished altogether vicarious liability under an apparent authority theory in cases subject to the MPLA.

The law of apparent agency is a reliance-based concept designed to protect the reasonable expectations of the plaintiff. *See, e.g.*, syl. pt. 7, *Burless v. West Virginia Univ. Hosps., Inc.*, 215 W.Va. 765, 601 S.E.2d 85 (2004). But the purpose of punishment is far different. "[A] positive element of conscious wrongdoing is always required" in order to justify punitive damages, and it is "improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously." *Kolstad*, 527 U.S. at 538, 543 (quotations omitted). Moreover, because there is no substantive right to an award of punitive damages,[41] the plaintiff cannot be said to have acquired any reasonable expectation of them from the mere appearance of (an actually nonexistent) agency.

Accordingly, the United States Supreme Court was standing on well-established ground when it "rejected the theory that an employer is vicariously liable for punitive damages based solely on the employee's apparent authority[.]" *United States v. S. Maryland Home Health Servs., Inc.*, 95 F.Supp.2d 465, 470 (D.Md. 2000) (citing *Kolstad*).[42] This Court should reject it as well.

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[41] *Pendleton v. Norfolk & W. Ry. Co.*, 82 W.Va. 270, 95 S.E. 941, 944 (1918) ("The jury is at perfect liberty, no matter how wanton or reckless the defendant has been, to refuse punitive damages[.]")

[42] *See also American Societyy of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 582 (1982) (Powell, J., dissenting) (observing that "an apparent authority rule of

Hence, even if the actions of Dr. Koyawala, CRNA Melvin, or both, merited punishment, the record is clear – and the jury found – that they did not have the actual authority to so act on the Hospital's behalf. Hence, the Hospital could not be liable vicariously for punitive damages even had the jury been instructed on that question.

iv. Punitive Damages are Duplicative of Plaintiff's (Already Duplicative) Compensatory Damages

As the Hospital has shown, Plaintiff was awarded emotional distress damages twice for the same alleged wrong, merely because he gave his cause of action two different labels. The hefty award of punitive damages against the Hospital replicated these damages yet a third time.

This Court has long recognized the "openendedness" of damages for emotional distress, and that large awards of such damages may overlap with and improperly duplicate punitive damages. *See* syl. pt. 5, *Harless v. First Nat'l Bank*, 169 W.Va. 673, 289 S.E.2d 692 (1982); syl. Pt. 8, *Dzinglski v. Weirton Steel Corp.*, 191 W.Va. 278, 445 S.E.2d 219 (1994) ("In permitting recovery for emotional distress without proof of physical trauma when the distress arises out of the extreme and outrageous conduct intentionally caused by the defendant, damages awarded for the tort of outrageous conduct are essentially punitive damages. Therefore, in

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liability has rarely, if ever, been used to impose punitive damages upon the principal.").

many cases emotional distress damages serve the policy of deterrence that also underlies punitive damages."); *see also State Farm*, 538 U.S. at 426 (observing that compensatory damages for emotional distress "already contain [a] punitive element").

The overlap has a long pedigree. "Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." *Cooper Industries*, 532 U.S. at 437 n.11.

For these reasons, as regards the tort of outrage, this Court *presumes* that compensatory and punitive damages are duplicative unless the plaintiff comes forth with proof of a "*serious* physical or mental condition requiring medical treatment, psychiatric treatment, counseling or the like[.]" Syl. pt. 14, *Tudor v. Charleston Area Medical Center, Inc.*, 203 W.Va. 111, 506 S.E.2d 554 (1997) (emphasis added).

Boggs testified that he had had difficulty sleeping after his wife's death, particularly for the first six months, and that he began taking prescription "nerve pills" to induce sleep. Tr. Vol. I (March 3, 2006) at 580-81. He also saw his doctor three or four times about his feelings of depression. He was prescribed anti-depressant medication, but stopped taking it after about "a month." Tr. Vol. I (March 3, 2006) at 580-81.

It is important here to reiterate that Plaintiff's damages for intentional infliction of emotional distress must relate to distress that is *independent* of his understandable grief cause by his wife's death. That grief is subsumed in his claims of medical negligence, and his recoverable damages therefor are limited by the Medical Professional Liability Act.[43] Instead, only that degree of emotional distress attributable to the alleged outrage and fraudulent concealment can be taken into account when applying *Tudor*'s central principle:

> In cases where the jury is presented with an intentional infliction of emotional distress claim, without physical trauma or without concomitant medical or psychiatric proof of emotional or mental trauma, i.e. the plaintiff fails to exhibit either a serious physical or mental condition requiring medical treatment, psychiatric treatment, counseling or the like, any damages awarded by the jury for

---

[43] Moreover, although the Hospital was found independently negligent on Plaintiff's wrongful death claim, only the negligence of Koyawala and Melvin was found to be "so excessive, reckless or aggravated that punitive damages should be awarded[.]" *See* Journal Order and Judgment Entry (May 3, 2006) at 7 (question 3) and 9 (question 12). Mere negligence cannot support an award of punitive damages. *Bennett v. 3 C Coal Co.*, 180 W.Va. 665, 379 S.E.2d 388, 394 (1989). Hence, the punitive damages award against the Hospital can and must rest solely on the fraudulent concealment and outrage claims. As was described above, Plaintiff freely conceded as much at trial. *See supra* at 22 & n.16.

> intentional infliction of emotional distress under these circumstances necessarily encompass punitive damages and, therefore, an additional award for punitive damages would constitute an impermissible double recovery. Where, however, the jury is presented with substantial and concrete evidence of a plaintiff's serious physical, emotional or psychiatric injury arising out of the intentional infliction of emotional distress, i.e. treatment for physical problems, depression, anxiety, or other emotional or mental problems, then any compensatory or special damages awarded would be in the nature of compensation to the injured plaintiff(s) for actual injury, rather than serving the function of punishing the defendant(s) and deterring such future conduct, a punitive damage award in such cases would not constitute an impermissible double recovery. To the extent that this holding conflicts with our decision in *Dzinglski v. Weirton Steel Corp.*, 191 W.Va. 278, 445 S.E.2d 219 (1994), it is hereby modified.

Syl. pt. 14, *Tudor*.

The Court elaborated on this syllabus point in the text of its opinion:

> [I]n order to collect damages for intentional infliction of emotional distress, as well as punitive damages in the same action, the jury must be presented with some *quantifiable measure* of compensatory damages sustained from the intentional infliction of emotional distress so that *it is clear* that those damages are not duplicative punitive damages.

506 S.E.2d at 575 (emphasis added).

Whatever else may be said as regards Mr. Boggs' evidence of emotional distress, it most certainly provides no "quantifiable" basis for a $375,000 award. It obviously provides even less of a basis for the additional $100,000 awarded for the same injury under his fraudulent concealment theory. Even in the twenty-first century, $475,000 remains a lot of money – it certainly could buy many orders of magnitude more treatment than Mr. Boggs sought.

Moreover, even if *all* of Mr. Boggs' emotional distress awards are not punitive damages in disguise – and perhaps they are not – the Circuit Court was still required to examine those awards carefully to assure against double (or triple) recovery:

> Where a jury verdict encompasses damages for intentional infliction of emotional distress, absent physical trauma, as well as for punitive

> damages, *it is incumbent upon the circuit court to review such jury verdicts closely* and to determine whether all *or a portion* of the damages awarded by the jury for intentional infliction of emotional distress are duplicative of punitive damages such that some or all of an additional award for punitive damages would constitute an impermissible double recovery. If the circuit court determines that an impermissible double recovery has been awarded, it shall be the court's responsibility to correct the verdict.

Syl. pt. 15, *Tudor*. The Circuit Court utterly failed to perform this "incumbent" duty. Had it done so, it could only have concluded that at least a substantial portion of Mr. Boggs' awards of compensatory and punitive damages were duplicative (or indeed triplicative).

v. There was an Insufficient Factual Predicate for an Award of Punitive Damages

Punitive damages may not be awarded in West Virginia unless the defendant's misconduct transgresses a very high threshold of blameworthiness. This threshold was established by this Court over a century ago and has remained unchanged ever since:

> In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or

> criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.

Syl. pt. 4, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895); *see also* syl. pts. 4 and 7, *Alkire v. First Nat'l Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996) (quoting *Mayer* and establishing "two-step paradigm" in which its conduct test is the first).

The Hospital respectfully submits that its actions as regards Mrs. Boggs' surgery and its aftermath do not approach, much less transgress, the *Mayer v. Frobe* threshold. Hence, the question of punitive damages should not have been submitted to the jury, and the erroneous award of punitive damages should have been set aside.

vi. The Circuit Court's Failure to Properly Review the Punitive Damages Award Deprived the Hospital of Procedural Due Process

"Punitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co.*, 512 U.S. at 432. For this reason, punitive damages warrant special procedural protections. The safeguards required by this Court were announced in *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).[44] They have three

[44] These procedures are modeled over those approved by the United States Supreme Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

elements – jury instructions, review by the trial court, and appellate review by this Court.

The necessary instructions were described in Syllabus Point 3 of *Garnes*:

> When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:
>
> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury should consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm,

> whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for actual harm caused once his liability became clear to him.
>
> (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
>
> (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.
>
> (5) The financial position of the defendant is relevant.

Similarly, careful judicial review of the amount of a punitive damages award is also required by the Fourteenth Amendment's Due Process Clause. *Honda Motor Co.*, 512 U.S. at 432-435. This judicial review safeguard is intended to operate as a *constraint* on punitive damages awards. *Garnes*, 413 S.E.2d at 904 (judicial review "insures that awards do not exceed an amount that will accomplish society's goals of punishment and deterrence").

Syllabus Point 4 of *Garnes* describes the minimum required judicial review:

> When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:
>
> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;
>
> (3) Any other civil actions against the same defendant based on the same conduct; and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlement when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.
>
> Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar

> lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

The Circuit Court failed to conduct this analysis, thereby depriving the Hospital of its procedural due process right to it. The judgment order is totally silent as to *Garnes*. At the hearing on the Hospital's post-trial motions, the Court perfunctorily assured the parties that it had conducted the analysis,[45] but again no order has been entered elucidating the court's reasoning.

Without the benefit of the Circuit Court's analysis, Camden-Clark is hampered in critiquing it here. Nonetheless, it will briefly state its position as regards the *Garnes* factors.

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[45] The Court stated:

> [T]he Court has analyzed the punitive damages and find that they are not out of line with the compensatory damages and has considered all the factors cited by the Defendant, and that the Court believes the jury's award of punitive damages, although large in this case, in what the Court would consider a large amount of damages, in fact, they are reasonable and should not be set aside by this Court, even after reviewing all the standards regarding punitive damages.

Tr. (Aug. 24, 2006) at 66.

(1) The Hospital submits that relying on privileges to withhold documents – even if the claims of privilege prove incorrect – neither caused nor is likely to cause significant harm. Courts sort out such things routinely, using their power of *in camera* review, and a party who challenges a claim of privilege is not likely to suffer any ultimate harm if his challenge has merit.

(2) As for reprehensibility, the Hospital must again simply state that it took legal positions in good faith and in its own defense, and it had no intention of causing the Boggs family any harm.

(3) The Hospital obviously did not profit from its conduct.

(4) The punitive damages award of $3,000,000 does not bear a reasonable relationship to compensatory damages. The compensatory award for fraudulent concealment and outrage is $475,000, and, as was discussed at length above, most or all of it already constitutes punitive damages under the *Tudor* rule. We do not (and perhaps cannot) know the actual size of the compensatory component, but it seems likely that the ratio of punitive to compensatory damages here is well into double-digits. Even if *all* of the compensatory award were truly that, the ratio would still be 6.3 to 1. Such an award would be constitutionally excessive given the lack of any evidence that the Hospital acted with evil intention in order to cause harm. *See* syl. pt. 15, *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992).

(5) Although no evidence of the Hospital's financial condition was in evidence, Plaintiff's counsel urged the jury to punish the Hospital on account of its status as a large area business: "Camden-Clark Hospital, they're a heavyweight around here. And a heavyweight is not punished with a featherweight punishment. If you award punitive damages in this case, as you award those damages, you need to consider the might and power of who it's being awarded against." Tr. Vol. III (March 9, 2006) at 255-56.

In light of this argument, the Hospital submits that the jury may well have returned the excessive award because it had been instructed that a defendant's financial condition is relevant. But since *Garnes* was announced, the United States Supreme Court has held flatly that "[t]he wealth of a defendant *cannot* justify an otherwise unconstitutional punitive damages award." *State Farm*, 538 U.S. at 427 (emphasis added). Because this award would be excessive for any defendant, it cannot be rendered constitutional just because the Hospital may have the means to pay it.[46]

The supplemental factors stated in *Garnes*' syllabus point 4 have little bearing here. Medical malpractice litigation is by its nature costlier than many other types. There have not, of course, been any criminal sanctions imposed on the

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[46] The Hospital respectfully submits that, in light of *State Farm*'s clear holding, this Court should strike the fifth *Garnes* factor, or else modify it to specify that while poverty might justify an award *below* the constitutional maximum, wealth can never justify an award *above* it.

Hospital, and the other civil actions against the Hospital arising on these facts have all been filed by the Plaintiff. Finally, the Hospital denies that its privilege claims inflicted a "clear wrong" for which the prospect of punitive damages should serve as an impetus for settlement.

In sum, the Hospital submits that a proper *Garnes* analysis – had one been performed by the Circuit Court – can lead to only one result: the punitive damages award is excessive and should be reversed.

vii. The Punitive Damages Award Violated the Hospital's Substantive Due Process Rights

Due process imposes a substantive limit on the State of West Virginia's power to punish.

> Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. The Due Process Clause of its own force also prohibits the States from imposing "grossly excessive" punishments on tortfeasors[.]

Cooper Indus., 532 U.S. at 433-434 (citations omitted).

A fundamental restraint on the power to punish is fair advance notice of the potential punishment:

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of *the severity of the penalty* that a State may impose.

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996) ("*Gore*") (emphasis added).

Gore's holding – however "elementary" its footing – was a groundbreaking one. *Gore* "is the first case in modern times in which the Supreme Court has found a punitive damages award to be so excessive that it violates the *substantive* component of the Due Process Clause." *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 636 (10th Cir. 1996) (emphasis added). Until that time, the Court's efforts to rein in punitive damages had involved only *procedural* safeguards, and most courts had assumed that a punitive damages award made at a fair trial and subjected to proper review was unassailable. *See BMW of North America, Inc. v. Gore*, 701 So.2d 507, 510 (Ala. 1997) (on remand). In other words, a defendant is entitled not only to a

fair *procedure* (à la *Garnes*), but also a fair substantive *result*.[47]

The *Gore* Court established three "guideposts" for substantive due process review of punitive damages awards: the degree of reprehensibility of the conduct; the disparity between the award and the harm or potential harm suffered; and the difference between the award and the civil penalties authorized or imposed in similar cases. 517 U.S. at 575.

Although the Hospital believes for the reasons already stated that its claims of privilege were well-taken, the worst that can be said of them is that they were mistaken. Such mistakes are not "reprehensible" in the sense that they call for an immense award of punitive damages. *Vandevander v. Sheetz, Inc.*, 200 W.Va. 591, 490 S.E.2d 678, 691 (1997) ("bad or legally incorrect corporate policy is not the equivalent of a mean-spirited, evil intent to cause harm"). There was also no evidence that similar conduct by the Hospital had ever been held to be unlawful before. *See Gore*, 517 U.S. at 579 (deeming it "significant" on the question of reprehensibility that there was no evidence that the defendant "persisted in a course of conduct after it had been adjudged unlawful on even one occasion").

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[47] An apt analogy to this distinction is a criminal trial, in which the defendant is entitled to various procedural protections and safeguards. But those procedures are not his only due process guarantees. In addition, when the trial ends with a guilty verdict, he is also entitled to a punishment within the substantive limits prescribed by preexisting law.

The second guidepost is the harm or potential harm suffered. Again, it seems unlikely that assertions of privilege could cause significant, let alone grievous, harm, especially to someone who is represented by counsel when those assertions are made.

Finally, under the third guidepost, there is a drastic difference between the punishment imposed on Camden-Clark in this case and a typical statutory civil penalty. Plaintiff's most scandalous (albeit untrue) allegation against the Hospital was that it destroyed, tampered with, or altered medical records. West Virginia does not appear to have a specific statute addressing such misconduct, but a sampling of other states' laws reveals financial penalties in the range of $500 to $1,000.[48] The punitive damages award against the Hospital is three thousand times greater than even the higher figure.

In light of the *Gore* guideposts, the Hospital submits that it is clear that no one could

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[48] *See, e.g.*, Fla. Stat. Ann. §§ 395.302, 775.083 (2006) (punishing fraudulent alteration or falsification of a medical record as a misdemeanor subject to a fine of up to $500); Ga. Code Ann. §§ 16-10-94.1, 17-10-3 (2006) (punishing alteration or falsification of a medical record "with intent to conceal any material fact relating to a potential claim or cause of action" as a misdemeanor subject to a fine of up to $1,000); Mich. Comp. Laws § 750.492(a) (2006) (punishing intentional destruction of medical records as a felony, and reckless inclusion of misleading or inaccurate information in a medical record as a misdemeanor subject to a $1,000 fine); Miss. Code Ann. § 41-10-1 (2006) (punishing falsification or destruction of a medical chart as a misdemeanor subject to a fine of up to $1,000).

have had fair notice that the conduct complained of might subject a civil defendant to a punishment of $3 million. Accordingly, the award in this case violates the Hospital's substantive due process rights.

V. CONCLUSION

The record shows that Mrs. Hilda Boggs was a respected and valuable contributor to her community. It also discloses that her family and friends grieved her passing deeply and sincerely. Reduced to its barest essentials, the mission of the Hospital is to improve life and forestall death, and so it can only regret the result of that attempted surgery on the evening of September 29, 2001.

The record is clear in other ways as well. Privileged documents were improperly disclosed, rendering the entire verdict unreliable and infirm. Ordinary post-complaint privilege assertions were substituted for the scheme of fraudulent concealment alleged in the complaint. The same damages were recovered more than once. A phantom award against non-parties increased the Hospital's liability by $1.5 million. With the scantest of evidence of quantifiable harm caused by its alleged intentional misdeeds, the Hospital has been assessed $3 million in punitive damages. The Hospital respectfully submits that it too is a valuable contributor to its community, and that the record demonstrates nothing that could justify the degree of punishment it faces.

There can be no doubt that the Circuit Court's errors were substantial, harmful, and

reversible. Plaintiff's counsel made an apt remark at the February 24, 2006, hearing, describing the effect that having the privileged documents had made on his case. Said counsel, "it makes a huge difference, the material that's in there, in issues to this case. I mean, I shudder to think the trial that would have taken place if we'd never gotten it." Tr. (Feb. 24, 2006) at 101. The Hospital does not "shudder" at the thought of such a trial – it would have been a fair one. The Hospital remains entitled to that trial.

This petition should be granted, and, upon appeal, the judgment below should be reversed and the case remanded to the Circuit Court of Wood County for a new trial.

Respectfully submitted,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

BERNARD BOGGS, as Administrator of the Estate of HILDA BOGGS, deceased, as Personal Representative of the statutory beneficiaries of the wrongful death claim herein asserted and in his own right,

Plaintiff below,
Respondent,

v.

CAMDEN-CLARK MEMORIAL HOSPITAL CORPORATION,

Defendant below,
Petitioner.

CAMDEN-CLARK MEMORIAL HOSPITAL'S SECOND PETITION FOR APPEAL

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CAMDEN-CLARK MEMORIAL HOSPITAL'S SECOND PETITION FOR APPEAL

Pursuant to W.Va. R. App. P. 3 and W.Va. Code § 58-5-3, Camden-Clark Memorial Hospital Corporation (the "Hospital" or "Camden-Clark") petitions a second time for an appeal of a judgment of the Circuit Court of Wood County, the Hon. Robert A. Waters presiding, in *Boggs v. Camden-Clark Memorial Hospital Corp.*, No. 03-C-296 (W) (Wood (W.Va.) Cir. Ct.). As the Hospital will show below, its petition should be granted.

I. Kind of Proceeding and Nature of the Ruling Below

This case arose from the death of Mrs. Hilda Boggs after attempted surgery at the Hospital in September 2001. Her husband and personal representative, Bernard Boggs, filed this action in the Circuit Court of Wood County in June 2003. He alleged claims for negligence against the Hospital, an anesthesiologist (Dr. Manish Koyawala), and the anesthesiologist's practice group (United Anesthesia). He also asserted that the Hospital was liable on other theories, including fraudulent concealment and outrage. Dr. Koyawala and United Anesthesia reached a pretrial settlement of the claims against them, paying $2 million to Plaintiff,[1] and they were dismissed from the action. After a trial, judgment was entered against the Hospital in the amount of $4,834,380. Of that sum, $3 million

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[1] *See* Journal Order and Judgment Entry at 9 (stating amount of settlement proceeds).

represented an award of punitive damages against the Hospital, and another $1.5 million resulted from the Circuit Court's refusal to credit the Hospital with the full amount of the pretrial settlement with the anesthesia providers.

The Circuit Court signed a judgment order on April 28, 2006, which order was forwarded to the Clerk of Court for subsequent entry. Entry actually occurred on May 3, and the Hospital then timely moved for a new trial and to alter and amend the judgment. The Court heard argument on both motions on August 24, 2006, and it stated from the bench that it was inclined to deny them, both on the merits and because it accepted Plaintiff's argument that they were untimely. Because untimely motions would fail to stay the period for perfecting an appeal,[2] the Hospital asked the Court alternatively to grant a two-month extension of time to file a petition, pursuant to W.Va. R. App. P. 3(a) and W.Va. Code § 58-5-4. The Court granted the extension to October 28, 2006, and the Hospital filed a petition for appeal on October 26, 2006. That petition is pending before this Court at Docket No. 063408.

That same day, October 26, 2006, the Circuit Court finally signed a written opinion and order on the Hospital's post-trial motions (the "Post-trial Order"). The motions were denied as untimely and for other reasons stated therein. Because those motions were in fact and law timely made, the four-

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[2] *See* W.Va. R. Civ. P. 72; *Mooney v. Barton*, 155 W.Va. 329, 184 S.E.2d 322, 325 (1971).

month period for an appeal from the judgment below began to run as of that date. Accordingly, the Hospital now files a second timely petition for appeal. Much of what follows is identical to the Hospital's initial petition, although in this iteration the Hospital has the opportunity to address the written Post-trial Order.

II. Statement of Facts

A. Mrs. Boggs' Surgery and Death

On September 28, 2001, Mrs. Hilda Boggs, a fifty-year-old school teacher at Mineral Wells Elementary in Wood County, fell at work and broke her left ankle. She sought treatment later that day at Camden-Clark Memorial Hospital in Parkersburg. Her attending physicians determined that she needed surgery to reduce and repair the ankle. She was admitted as an inpatient, and the surgery was scheduled for the next day. Miller Dep. (Nov. 30, 2005) at 4-6.

Mrs. Boggs' overall health was not enviable. She was seriously overweight (230 lb. at just 5'3" tall) and had been diabetic since childhood. She also suffered from asthma and hypertension. Her pre-operative testing, which included an EKG and echocardiogram, revealed that she likely had multivessel coronary artery disease and at least one prior heart attack. Gnegy Dep. (Nov. 4, 2004) at 9. Accordingly, Dr. David Gnegy, a cardiologist, recommended that she not be given general anesthesia, but instead that she be anesthetized only regionally. He described her as "at risk" for surgery,

but in his view the risk was an "acceptable" one. *Id.* at 9.

Because of the pre-operative testing and the special concerns it had raised, Mrs. Boggs' surgery was delayed until the evening of September 29. The attending anesthesiologist was Dr. Manish Koyawala, assisted by Certified Registered Nurse Anesthetist (CRNA) Evelyn Melvin. Koyawala and Melvin were both employees of United Anesthesia Incorporated (UAI). They decided to administer spinal anesthesia, which would permit Mrs. Boggs' ankle fracture to be repaired without her totally losing consciousness and, in accordance with the recommendations of Dr. Gnegy, would avoid the dangers of general anesthesia for someone with such compromised health. Melvin Dep. (Aug. 3, 2005) at 45-51.

Mrs. Boggs was given standard medications to control her pain and to calm her for surgery. Consistently with usual practice, she was placed on heart and pulse oximetry monitors. The Hospital had ensured that the audible alarm features of those monitors were in place and working, but Melvin – neither its employee nor its actual agent – turned them off. *Id.* at 21-22, 26-28, 143-44.

As the surgeon and other necessary personnel prepared for the ankle repair, Dr. Koyawala administered a spinal anesthetic, lidocaine. Tr. Vol. I (March 1, 2006) at 62. Within a few moments, Mrs. Boggs stopped breathing. Sheila Sleeth, Camden-Clark's circulating nurse, first

observed that Mrs. Boggs' complexion had become "dusky," and she quickly alerted those on hand. Tr. Vol. I (March 1, 2006) at 66-67.

Mrs. Boggs was in cardiac and respiratory arrest. Emergency resuscitation efforts began immediately, and those efforts restored both heartbeat and breathing within minutes. Melvin Dep. (Aug. 3, 2005) at 115-17. But Mrs. Boggs had already suffered irreversible brain damage, and she never woke up. She died six days later.

The Boggs family commissioned a private autopsy by Dr. Paul Mellen of Charleston. His observations confirmed the risks revealed in Mrs. Boggs' pre-operative testing. Dr. Mellen found that, at the time of her death, Mrs. Boggs had had atherosclerosis with greater than 75% narrowing of the left anterior and right coronary arteries, and near total occlusion of the mid-left anterior descending coronary artery. Tr. Vol. I (March 1, 2006) at 99-106. He also concluded that Mrs. Boggs had had multiple heart attacks in the past. *Id.* at 106. He closed his report with this summary opinion:

> The autopsy showed extensive coronary artery disease with critical stenosis of the left coronary artery[,] multiple myocardial infarcts which would be a risk for sudden cardiac death, as well as hypertensive and diabetic changes of the kidneys, peripheral vascular disease, and mild lung and thyroid disease, and a left ankle fracture.

> Toxicology testing showed no obvious drug overdose. The death should be considered ACCIDENTAL, as it occurred during surgery for an injury in a high risk patient.

Autopsy of Hilda S. Boggs (Oct. 8, 2001) at 3 (emphasis in original).

Within two or three days of the attempted surgery, while Mrs. Boggs was still alive, her husband Bernard Boggs retained a lawyer. Tr. Vol. II (March 8, 2006) at 347. This lawyer, Christopher Rinehart, then assisted the Boggs family during interviews with the doctors and nurses involved in this incident, and his presence naturally alerted the Hospital to the likelihood of ensuing litigation.

This likelihood soon became reality. In fact, four suits have now been filed by the Boggs family against the Hospital. The first was never served, while the second and third were substantively identical. The fourth is in its early stages and is not relevant to this appeal. This appeal is from judgment in the second-filed case, Wood Co. Cir. Ct. No. 03-C-296.

B. Summary of the Litigation

This petition will focus in greatest detail on the facts relevant to the most far-reaching of the Circuit Court's errors, which involved the improper disclosure of privileged material to the Plaintiff. The Hospital will demonstrate the various

ways in which the Plaintiff exploited these disclosures, and it will do its best to explain and highlight the resulting prejudice that it suffered. In addition, the Hospital will also describe, where appropriate or necessary, several other errors committed by the Circuit Court before, during, and after the trial.

i. Pretrial Errors by the Circuit Court

Document discovery in this case led, as it does in many if not most cases, to objections to certain production on the grounds of privilege. The Hospital made objections as and when it believed they were appropriate, in particular as regards documents protected by peer review confidentiality under W.Va. Code § 30-3C-3, by the attorney-client privilege, and by the party work product (or "trial preparation materials") rule stated in W.Va. R. Civ. P. 26(b)(3). Well before trial, the Hospital's trial counsel, Richard A. Hayhurst, provided a significant number of documents to the Circuit Court for *in camera* review of the merit of the Hospital's privileged-based objections.

At the pretrial conference on February 10, 2006, Mr. Hayhurst learned that, without notice to him, the Circuit Court had already disclosed a significant portion of this *in camera* submission to the Plaintiff. Tr. (February 10, 2006) at 21-25. This discovery occurred when Plaintiff's counsel began excitedly describing their contents during the pretrial conference:

Mr. Regan [Plaintiff's co-counsel]: There's tremendous stuff in there, Judge. We never knew that Evelyn Melvin had taken three turns herself at trying to administer the spinal to Mrs. Boggs. We didn't know that Dr. Koyawala took two whacks at it.

Mr. Hayhurst: How does he know this? You haven't released those documents.

Mr. Regan: I do know that. And you know the significance of it is kind of illustrated by counsel rising so fast to talk about it.

The Court: We're releasing that stuff today. They're being released.

Mr. Regan: I also didn't know that Bernice Burns said we need to get rid of the times on the rhythm strips, which is a shocking act of a hospital employee, saying we need to get rid of the times there. That's critical evidence as to what happened with Mrs. Boggs' heart rhythm. ...

Mr. Hayhurst: Judge, I think I'm entitled to know how they've got material that has not been released

by the Court. May I know that, please? I'm not questioning the Court.

The Court: Well, we've gone through what you've given us for in-camera review and we've determined as of today if it was to be released, what was determined ought to be attorney/client privilege. Some was withheld as attorney/client privilege and some was released or withheld because of Chapter 30, Article 3C.

Mr. Hayhurst: I understand.

The Court: Those things were held back, but the other witness statements, hospital records and so forth were released.

Mr. Hayhurst: When? I never got notice that they were released.

The Court: A letter today. Mr. Regan picked them up.

Tr. (February 10, 2006) at 21-23. Though less than three weeks remained before trial, the Hospital diverted time from its preparation to prepare and file a petition for writ of prohibition in this Court on February 21, 2006, challenging the Circuit Court's action in disclosing the privileged documents. *See State ex rel. Camden-Clark Mem'l Hosp. Corp. v.*

Waters, No. 060443 (W.Va). The Petition contains a thorough inventory of the improperly disclosed materials. *See id.*, Petition (Feb. 22, 2006) at 18-23, and appendices. This Court declined to issue a rule to show cause, and so the trial went forward as scheduled.

This statement of facts will primarily discuss three particular types of wrongfully disclosed documents: (1) witness interview summaries that constituted trial preparation materials and attorney-client communications; (2) a peer review "trend-tracking" document concerning Dr. Koyawala, commonly referred to throughout the litigation as his "report card"; and (3) a peer review file compiled during a "root cause analysis" of what went wrong in Mrs. Boggs' case.

The Hospital focuses on these particular documents because their prejudicial use at trial is amply and easily demonstrated throughout the record. These documents, however, do not stand alone; a good deal of other privileged material was also improperly disclosed to Plaintiff by the Circuit Court.[3] These other documents were equally prejudicial to Camden-Clark's defense because they opened a window for Plaintiff's counsel to view Camden-Clark's trial preparation. Their effect is simply less visible in the record and therefore harder to explain in the space available for this petition.

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[3] Among these was a formal external peer review report prepared by Permidion concerning Mrs. Boggs' case. Tr. Vol. III (March 7, 2006) at 19.

a. Witness Interview Summaries

The witness interview summaries were prepared by Sherry Johnston, Director of Risk Management for Camden-Clark, to assist Mr. Hayhurst in preparing for and defending this litigation. In a series of pretrial hearings, the Circuit Court ruled that these interview summaries were not protected by either the attorney-client privilege or work product rule. Order (August 3, 2005) at 3; Tr. (December 19, 2005) at 81 ("the Court ruled in August that Ms. Johnston, her work was not protected by attorney/client privilege or work product. And that order from August stands."); Tr. (February 10, 2006) at 21-25.[4] This ruling was erroneous because Ms. Johnston was an agent of the Hospital and she prepared these summaries for only one purpose: to assist the Hospital (and its in-house and outside counsel) in preparation for litigation. To this end, the documents were marked "confidential attorney-client communication" at the top. Furthermore, the documents often contained Ms. Johnston's personal thoughts and views on each witness' responses and demeanor, as reflected in notes that were clearly directed towards Camden-Clark's trial counsel.[5] Their status as attorney-client

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[4] The Court repeated its ruling yet again as to four interview summaries produced in a supplemental response by the Hospital at the outset of trial. Tr. Vol. I (Feb. 28, 2006) at 27.

[5] For example, in the Charlie Weedle interview summary, Ms. Johnston writes: "I think that this kid could be well-meaning but he does not have much maturity. He may very well make a poor witness. . . . I also told him that I anticipated litigation and because of this, I had spoke to our

communications and "trial preparation materials" could scarcely be more self-evident.

b. Peer Review "Report Card"

A so-called peer review "report card" is created solely to gather information that can track trends within an individual physician's practice. Mr. Shorr, Plaintiff's own expert witness, conceded to the court (outside the hearing of the jury, however) that such a report card is considered peer review material:

> **The Court**: Let me ask him if he knows, as a hospital administrator, is this considered peer review material.
>
> **The Witness**: It is considered peer review material in the context of the specific review of each incident. It is considered credentialing material when it is factored into the credentials committee to answer the larger question: Is this person competent[?]

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defense attorney about the case. The defense attorney, in turn, had asked me to speak with Charlie about his memories. Therefore, our conversation today was confidential and I did not want him speaking of it to other people." Similarly, in the Bernice Burns witness interview summary, Ms. Johnston writes: "This RN has a tendency to make statements which, when questioned, she has to re[s]cind . . . . (This report given to Richard Hayhurst on 10/18/01)."

Tr. Vol. I (March 2, 2006) at 295.[6]

Dr. Koyawala's peer review report card tracked his practice from September 5, 1999 to October 2, 2001. *Id.* at 304. It contained summaries of three events in which he had been involved. *Id.* at 281-82. If certain trends reveal themselves, this tracking mechanism can trigger a more in-depth peer review investigation; however, no fault had been found on Dr. Koyawala's part in any of three "incidents" listed in the report card. Nevertheless, the Circuit Court disclosed this document to Plaintiff, and allowed its use as an exhibit throughout the trial.

c. Root Cause Analysis

Among the many other privileged peer review materials wrongfully disclosed to Plaintiff were documents from Camden-Clark's Root Cause Analysis file. Tr. (February 10, 2006) at 21-24; Tr. (February 24, 2006) at 94-97.

A "root cause analysis" is a type of peer review that is triggered by the occurrence of a "sentinel event." A sentinel event is, in turn, a major or alarming incident at a hospital that merits review and investigation. When a sentinel event occurs, the hospital investigates from as many angles as possible to try to find out *why* the event occurred –

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[6] The distinction Mr. Shorr draws between peer review and credentialing is meaningless in West Virginia, because credentialing *is* "peer review." Syl. pt. 5, *State ex rel. Charles Town Gen. Hosp. v. Sanders*, 210 W.Va. 118, 556 S.E.2d 85 (2001).

the root cause. Tr. Vol. II (March 6, 2006) at 105-10. Root cause analysis is a privileged peer review function under West Virginia law.

The Circuit Court gave Plaintiff's counsel, among other things, root cause analysis meeting minutes that were clearly labeled "Protected under WV Code 30-3C-3." RCA Meeting Minutes (October 4, 2001) at 1. This meeting occurred on the day before Mrs. Boggs' death. *Id.* at 1, 5. At the meeting, a group of doctors and nurses shared their recollections and discussed their thoughts on the incident. *Id.* at 1-4. Participants were instructed that "[t]his is under peer review protection – do not discuss outside, no notes to be taken during this meeting." *Id.* at 1. The group identified "[t]hings to check on" and devised a "Plan of Correction." *Id.* at 4.

Even Plaintiff's counsel was surprised that the Circuit Court gave him the minutes of this meeting, as he candidly admitted to the Circuit Court a few days before trial. Tr. (February 24, 2006) at 94-97. Nevertheless, he did not hesitate to use the minutes during an *in camera* examination of Cynthia Carpenter[7] at trial – in support of a logic-twisting argument that any witness statements or notes prepared after the meeting could not be a part of the root cause analysis. Tr. Vol. II (March 6, 2006) at 145-47. This spectacle – Plaintiff's counsel using one wrongfully obtained privileged document

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[7] Ms. Carpenter was the Hospital's Director of Quality Assurance and Medical Staff Office at the time of Mrs. Boggs' death. Among her duties was coordinating the peer review process.

to argue that other privileged materials were undeserving of protection – elegantly illustrates the layers of prejudice that were heaped upon the Hospital during the trial.

Plaintiff's access to the root cause analysis, together with the witness statements from Ms. Johnston's investigation, also combined to provide Plaintiff with material that he could distort into his most inflammatory allegation at trial – that Johnston instructed witnesses to destroy evidence. What actually happened is readily explained within the context of the privileges on which the Hospital relied. Ms. Carpenter asked several persons to write out their recollections for the use of the root cause analysis – these notes were neither spontaneously written nor composed for any other purpose. When two of these same persons (Charlie Weedle and Anna Haney) were independently interviewed by Ms. Johnston, they stated that they had made copies of what they had given Ms. Carpenter. Because the notes were privileged peer review documents, Ms. Johnston advised these persons that they should not keep personal copies. Tr. Vol. I (March 3, 2006) at 502-503, 512-515, 521.[8]

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[8] Ms. Johnston's concern that copies of peer review materials not be maintained outside the review organization was not merely for the self-interest of the Hospital. As the Hospital discusses below but should note here, it has an obligation *to the providers whose actions are the subject of the peer review* to maintain the confidentiality of the file.

Plaintiff also theorized below that the notes of a third witness, Bernice Burns, had disappeared or been destroyed. The Hospital does not have them, if they ever existed. Burns did testify that she was not told to destroy notes. Burns Dep. at 71.

ii. Plaintiff's Use of the Hospital's Privileged Documents at Trial

The trial proved to be as much or more about the Hospital's claims of privilege than the underlying wrongful death action. The contentions of the parties as regards the causes of Mrs. Boggs' death can be quickly summarized. Plaintiff asserted that his wife died because of an overdose of anesthesia, a failure to properly monitor her cardiopulmonary status, or both. The Hospital countered that both the dose of anesthesia and the method of monitoring violated no established standards, and that Mrs. Boggs' preexisting compromised condition caused her to be unable to tolerate the procedure. The Hospital also showed, of course, that neither Koyawala nor Melvin was its agent or employee. Had these contentions alone been presented to the jury, and the law then properly applied to the verdict, it is unlikely that this petition would ever have been filed.

But it did not happen that way. Plaintiff made extensive use of the improperly disclosed documents, flooding the trial with information that should have been protected under the attorney-client privilege, the peer review privilege, or by Rule 26(b)(3). In his opening statement, Plaintiff's counsel immediately began emphasizing the content of the privileged materials to the jury. For example, he told the jury that "Dr. Koyawala had been involved in a previous death," an allegation that was based solely on one incident from Dr. Koyawala's peer review report card. Tr. Vol. I (Feb. 28, 2006) at 6. The Hospital's objection was

overruled. *Id.* at 7. Emboldened by the Circuit Court's ruling, Plaintiff's counsel elaborated on this line of argument by stating that "[t]he hospital knew that he had been involved in a previous death, and two other dangerous situations, but they never told the Boggs family." *Id.*

Plaintiff further relied on privileged materials during witness examinations. For example, Plaintiff's counsel examined circulating nurse Sheila Sleeth using the summary of her interview by Ms. Johnston. Plaintiff contended throughout trial that a set of Mrs. Boggs' printed cardiac monitoring strips had originally displayed printed times but no longer bore those times at trial. His counsel argued that these alleged printed times had been tampered with, cut off, or otherwise obliterated. His problem was a lack of evidence of it.[9] After Ms. Sleeth testified on direct that she had never heard anyone discuss removing these times, Plaintiff's counsel used the Hospital's witness interview summary for impeachment. During her interview with Ms. Johnston, Ms. Sleeth had described a "vague recollection" of hearing another nurse say "[w]e need to get rid of those times." Tr. Vol. I (March 1, 2006) at 75-77. In addition, Plaintiff's counsel asked whether Camden-Clark had provided a copy of the statement to Ms. Sleeth

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[9] Times are not printed along the top of periodic strips (*i.e.* strips run for short periods on demand), as opposed to continuous strips used to track heart function over a longer span. Tr. Vol. I (March 1, 2006) at 102, 104-05, 110, 112. Periodic strips were the only ones run on Mrs. Boggs during her resuscitation. *Id.* at 74-75.

during the preparation for her deposition, which prejudicially insinuated that Camden-Clark had tried to hide the interview summary from her. *Id.* at 80.

In some cases, privileged documents were actually admitted into evidence.[10] A prime (and particularly prejudicial) example is Dr. Koyawala's "report card." When Plaintiff proposed to show it to a witness and to the jury, the Court was initially hesitant: "This is something that could mislead the jury because here it is, three incidents listed, just like that." Tr. Vol. I (March 2, 2006) at 298. Besides being privileged, the document was indeed misleading – Dr. Koyawala had not been determined to have any responsibility in any of the three incidents. Nonetheless, the Circuit Court soon reversed course and admitted Dr. Koyawala's "report card":

> **The Court**: ... [H]ow do you find out a situation in which the hospital denies that there ever was any negative information about Dr. Koyawala, and years later, you found out that there was. Doesn't that create a manifest injustice? How is a plaintiff supposed to present their case?

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[10] Of the witness interview summaries prepared in anticipation of litigation, the Circuit Court admitted three into evidence: those of Charlie Weedle, Bernice Burns, and Anna Haney. Tr. Vol. II (March 8) at 372; Vol. III (March 9) at 191.

Mr. Hayhurst: There isn't anything negative about Dr. Koyawala.

The Court: Why did they put this down on this paper, these incidents? There must have been a concern at one time.

Mr. Hayhurst: If you want Cynthia Carpenter to come and explain that, we will bring her. . . . We are required to track trends in the practice of medicine. We are required to do that to determine whether there is a reason to investigate a doctor. If that doctor—how would we ever know, for example, if a doctor had excessive infection rates, if a surgeon ever had excessive infection rates, unless we kept track of that. One infection does not create a trend. Two may not. But if a doctor persistently turns up with wound infections during surgery at our hospital, and he is the only doctor that does on that day, then we have got to wonder whether he is involved in aseptic surgery. That is why we track things. That doesn't mean—the fact that something is entered in a tracking document doesn't mean that the doctor did anything wrong in that occasion, but they are all investigated, and they were in this case.

* * *

The Court: What did you say in opening statement about his record?

Mr. Regan: No incidents had been reported to the hospital administration.

Mr. Hayhurst: And that is true.

The Court: What is on that paper?

Mr. Hayhurst: Judge, no incidents involving culpable misconduct. Every doctor, every nurse has incidents that happen from time to time. They are investigated. If they are determined to have any validity to them, they are further investigated, and action is taken.

Mr. Regan: Judge, I don't see what else I could possibly need to justify the admission of this document beyond counsel's statement that he told the jury, in opening, that there were no incidents reported with this doctor. I mean, there are three right there. How could he possibly get away with something like that?

> **The Court**: Okay. I am going to overrule the objection. Plaintiff's exhibit 5 may be admitted, and then the hospital can explain it, that it doesn't mean a thing, that it is meaningless; even though they track these incidents, yet they are meaningless.

Id. at 300-03.

The admission and publication of this document to the jury was error in its own right, but it also created other extraordinary and unfair difficulties for the Hospital's defense. First (and perhaps chief) among these was rebutting the misimpressions Plaintiff deliberately sought to create concerning the three events identified on the document. As trial counsel attempted to explain to the Circuit Court: "Judge, the trouble is I can't counter [the trend-tracking report card] without breaching the peer review and patient confidentiality because I have to bring patient charts in here." *Id.* at 288.

In other words, the Hospital could not hope to effectively explain this privileged document *without using other privileged documents*, and in fact, Mr. Hayhurst ultimately resorted to using redacted versions of confidential patient charts in an attempt to do so. Tr. Vol. II (March 6, 2006) at 8-9, 11. There is scant reason to suppose that he succeeded. He certainly should not have been put to the task.

In any event, after the "report card" was in evidence, Plaintiff wasted no time in putting it to improper and prejudicial use. Specifically, Plaintiff's counsel asked Mr. Shorr the following questions, among others: (1) "[D]oes that document reflect whether or not Dr. Koyawala was involved in incidents that, according to the document, created a risk of harm to patients?"; (2) "[I]s there an incident on Dr. Koyawala's variance report that resulted in a death?"; (3) "Is this the type of information that you had previously told the jury should be taken into account by the hospital administration in reviewing credentials?"; (4) "And then there were additional incidents, in the documents that I handed you, where the hospital found potential for harm?"; (5) "Knowing all of this, as a hospital administrator, in your opinion, should this have triggered a review or revocation of Dr. Koyawala's credentials to practice medicine at Camden-Clark Memorial Hospital?" Tr. Vol. I (March 2, 2006) at 303-306. In response to each query, Mr. Shorr, Plaintiff's retained expert witness, answered affirmatively.

In addition, Plaintiff's counsel used privileged documents during his direct examination of several other witnesses.[11]

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[11] For example, Plaintiff's counsel relied on Sheila Sleeth's interview summary to correct Ms. Sleeth's recollection regarding whether she had ever seen CRNA Melvin administer a spinal anesthetic. Tr. Vol. I (March 1, 2006) at 56. In addition, Plaintiff's counsel used the Charles Weedle and Bernice Burns interview summaries to question Mr. Shorr regarding the alleged destruction of notes. Tr. Vol. I (March 2, 2006) at 319-22. During his adverse examination of Ms. Johnston during Plaintiff's case in chief, counsel used both the Anna Haney and Weedle interview summaries to examine Ms.

Things were of course no different when Plaintiff's counsel undertook to cross-examine the Hospital's witnesses. He asked Cynthia Carpenter, who coordinated the peer review process at the Hospital, a large number of questions based on Dr. Koyawala's "report card." Tr. Vol. II (March 6, 2006) at 111-128, 138-140. The inescapable result of these questions (and no doubt their intended purpose) was to make unfounded and misleading comparisons between Mrs. Boggs' surgery and the three prior incidents listed on the peer review report card. *Id.* at 117-19. For example, in one of the prior incidents the patient had a low oxygen saturation level, a low pulse, and appeared "dusky," all of which resemble the symptoms displayed by Mrs. Boggs. *Id.* Plaintiff's counsel elicited these similarities for one simple purpose: to suggest (incorrectly) that Mrs. Boggs' death was just the latest in a pattern of similar bad results.

Misuse of the "report card" took other forms. In one twist, during cross-examination of the Hospital's expert in the field of healthcare management, John McGinty, the following exchange occurred:

Q [by Plaintiff's Counsel]: Did you review Dr.

Johnston, focusing in particular on Ms. Johnston's alleged directions to destroy personal copies of notes. Tr. Vol. I (March 3, 2006) at 508-521. Finally, Plaintiff's counsel again relied upon the witness interview summaries during his redirect examination of Dr. Cyril H. Wecht, Plaintiff's expert forensic pathologist. Tr. Vol. II (March 8, 2006) at 319, 332.

Koyawala's report card for his clinical variances?

A [by Mr. McGinty]: I did not. I reviewed depositions where those were referred to.

Q: The jury has seen a document that has come into evidence that described a previous death in which Dr. Koyawala was involved as well as two dangerous incidents. Did you see that document before you came in court today?

A: No. I saw a deposition that made reference to those documents.

Q: But you haven't seen that document is the answer to my question; right?

A: I have to answer that I have not seen the document.

Q: Okay. So, you didn't see what Dr. Koyawala told Camden-Clark because the copy of the application you read was blacked out; right?

A: Right.

Q: And you didn't see his report card for his clinical variances

> before you came into court today to give your testimony that he was properly credentialed by Camden-Clark Memorial Hospital; right?
>
> **A**: Correct. I did not see the completed application. As I testified, I didn't expect to, and I shouldn't see that confidential peer review information. The same with the confidential peer review report card. I did not see it.

Tr. Vol. III (March 9, 2006) at 80-81. In other words, Plaintiff suggested that Mr. McGinty was necessarily less credible because the Hospital *did not* violate peer review confidentiality by showing him things that the Hospital *could not* show him.[12]

Some of Plaintiff's exploitation of his victory in (erroneously) obtaining peer review documents amounted to simply celebrating his victory in front of the jury. For example, also during the McGinty cross examination, Plaintiff's counsel queried:

> **Q [Plaintiff's Counsel]**: ... [A]t your hospitals, for example, did

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[12] In this regard, the Hospital must point out that it has no power to simply waive peer review confidentiality and share a document with a witness (or anyone else), even if it is in the Hospital's self-interest to do so. The power to waive confidentiality rests with the practitioner who is the subject of the peer review, in this case, Dr. Koyawala. *See* W.Va. Code § 30-3C-3.

they tell anybody when they come in, "We're going to be taking care of you. But if it goes bad, you are not going to find out the truth about what happened, because we keep all of that confidential through our peer review process?" Did you ever work at a hospital that told people that going in?

A: I don't believe at any hospital that I worked at or that I participated with as a consultant would I have seen a document that would have expressed what you just described.

Q. Certainly no thought that the Boggs family was advised going into this surgery that if things went bad with Mrs. Boggs that the hospital would feel free to put everything behind this wall of peer review and not tell them the truth about what happened?

A: Correct.

Id. at 94-96. Through such rhetoric-laden questioning, an assertion of privilege (and a well-taken one at that) was transformed into one of the pillars of Plaintiff's theories of liability. In addition to the specific instances quoted above, Plaintiff's

counsel also used privileged documents during his cross-examination of other witnesses.[13]

This wrongful disclosure and misuse of privileged documents had a ripple effect throughout the entire case that is easier to describe than to measure. The Hospital was not only forced to contend with the contents of the documents, but also was put in the awkward (and difficult) position of being forced to defend and vindicate the peer review regime itself. For example, during his cross-examination of Mr. Shorr, Mr. Hayhurst had to engage in a lengthy (and otherwise wholly unnecessary) discussion of the federal peer review mechanism, Congress' intent in passing the legislation, the purpose of the privilege, and West Virginia's own legislation on the subject. Tr. Vol. I (March 2, 2006) at 325-337. During the direct examination of Cynthia Carpenter, counsel was forced to spend a significant amount of time examining the witness about Dr. Koyawala's peer review "report card" and its role within the Hospital's peer review process. Tr. Vol. II (March 6, 2006) at 94-105. Furthermore, Mr. McGinty was examined at length regarding peer review processes,

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[13] For example, Plaintiff used Sheila Sleeth's interview summary to cross-examine Melissa Martin, the Hospital's expert on medical records management. Tr. Vol. II (March 7, 2006) at 185-86. Also, during Plaintiff's cross-examination of Dr. Philip Baliestrieri, an expert on anesthesia, Plaintiff's counsel referred to the interview summaries and asked Dr. Baliestrieri whether the Hospital had provided copies of those documents to him. *Id.* at 134.

mechanisms, and confidentiality. Tr. Vol. III (March 9, 2006) at 51-68.[14]

Such unusual testimony was necessary to attempt to refute the Plaintiff's frequent insinuation – and sometimes, as we have seen, outright charge – that the Hospital used peer review to fraudulently conceal documents and information from the Boggs family. *Id.* at 61, 67-68. The testimony was also devoted to rebutting the suggestion, which had arisen primarily from the wrongfully admitted witness interview summaries, that Ms. Johnston had instructed hospital employees to destroy evidence. *Id.* at 66-67.

In sum, privileged documents not only became Plaintiff's star evidence, but their withholding also became his theory of the case. Meanwhile, the Hospital's trial counsel labored to defend not just the subject of the litigation, but also the conduct of the litigation and the social wisdom of the privileges asserted.

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[14] The Hospital can of course cite other examples. Mr. Hayhurst was also forced to address peer review confidentiality issues during his redirect examination of Dr. Balestrieri, by asking whether Dr. Balestrieri would expect to be shown such confidential documents. Tr. Vol. III (March 7, 2006) 141. During his cross examination of Dr. Wecht, Mr. Hayhurst also essayed to defend the peer review process, the hospital's treatment of confidential documents, and the prejudicial implications of the witness interview summaries. Tr. Vol. II (March 8, 2006) 321, 340-42.

iii. Errors in the Instructions and Verdict Form

The Circuit Court mishandled the preparation and giving of the jury charge. Examples of this mishandling are highlighted here.

The Circuit Court exhibited some confusion regarding the law of punitive damages, and this confusion ultimately resulted in a misleading verdict form. The instructions and form curiously provide for the prospect of punitive damages against two persons who were not even defendants at trial: Koyawala and Melvin. The inclusion of these two non-defendants created unnecessary (and prejudicial) difficulties, as is evidenced by the trial transcript:

> **The Court**: . . . What about No. 12, punitive damages to Dr. Koyawala or Mrs. Melvin? What happens if they award—is the hospital liable for punitive damages if the award is against Dr. Koyawala or Evelyn Melvin?
>
> **Mr. Hayhurst**: No. And I think I need another instruction. A master is not punitively liable for the punitive misconduct of the servant absent expressed authorization or expressed ratification.

* * *

> **The Court**: Well, under what theory do have [*sic*] we then decided Koyawala of Melvin should have punitive damages awarded against them?
>
> **Mr. Hayhurst**: I didn't decide that.
>
> **Mr. Regan [Plaintiff's co-counsel]**: The deactivation of the safety alarms, Judge, the jury could certainly find that that's reckless. ...
>
> * * *
>
> **The Court**: Well, obviously under apparent or actual agency or other theories where the hospital would be liable, the hospital would be vicariously liable for the negligence [of] Dr. Koyawala and Mrs. Melvin. But since punitive damages aren't to punish Dr. Koyawala and Mrs. Melvin and the hospital, is the hospital to be liable for punitive damages against Dr. Koyawala or Mrs. Melvin, because I guess they're not being punished?

Tr. Vol. III (March 9, 2006) at 179-81. The question was further complicated by the differing conduct underlying Plaintiff's punitive damages theories. Plaintiff readily conceded that the only conduct for which he believed Camden-Clark could be held

independently liable for punitive damages was in essence a claim of intentional spoliation of evidence:

> **The Court**: In 11 and 12, why do we use different words for punitive damages with the hospital and against Dr. Koyawala and Nurse Melvin? What's the difference?
>
> **Mr. Regan [Plaintiff's co-counsel]**: The difference is that the wrongs alleged against Camden-Clark for which punitive damages are awardable are intentional. Nobody is claiming that they carelessly destroyed the evidence or recklessly destroyed the evidence, they did it on purpose. And with respect to Dr. Koyawala and Evelyn Melvin by contrast nobody is claiming that they intentionally wanted Mrs. Boggs to be harmed, but rather that they were recklessly indifferent to her safety in turning off the monitors. So, I think the appropriate language of punitive damages are available both for reckless and intentional misconduct, and that's why I separated it out that way.[15]

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[15] During his closing argument, Plaintiff's counsel reiterated his belief that Camden-Clark's exposure to punitive damages hinged on the fraudulent concealment claim:

> And then there's another question there, if you think Camden-Clark Memorial Hospital is liable for punitive damages. And that question,

Id. at 183-84. This jumbled discussion ultimately led to a most unusual and unclear verdict form:

> **The Court**: The first thing I'm going to do is put a separate line in there under 11-A. What amount of punitive damages do you award against Camden-Clark Memorial Hospital? And change the 13 to a 12-A, what amount of damages do you award against Dr. Koyawala or Nurse Melvin? So, it would cancel out the verdict as to whether Camden-Clark is liable for punitive damages against Koyawala and Melvin.
>
> **Mr. Hayhurst**: I'd ask that you make it clear that they should not consider the conduct of Melvin and Koyawala in connection with their assessment of Question 11-A.

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really by that time, you will have already answered it, because if you find that they have fraudulently concealed these things from the family, that the evidence is, in fact, gone, that they have covered this us . . . then you will have to ask yourself whether or not you think that conduct is . . . so outrageous, wrongful or intentional that punitive damages should be awarded?

Tr. Vol. III (March 9, 2006) at 254.

> **The Court**: 11-A is to award punitive damages for the conduct of Camden-Clark.
>
> **Mr. Hayhurst**: Yes. But they are indicating that the conduct of Koyawala and Melvin is the conduct of Camden-Clark in a number of their theories.
>
> **The Court**: Okay. I can foresee problems if they come back with no punitive damages against Camden-Clark, but punitive damages against Koyawala and Melvin.

Id. at 185-86. The remedy for these "problems" was of course not to submit the punitive damages liability of two empty chairs to the jury in the first place.[16] Nonetheless, after a bit more discussion, the Circuit Court added one further "clarification" to the punitive damages charge:

> **The Court**: I'm going to refuse [Camden-Clark's proposed

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[16] This submission resulted from Plaintiff's desire to describe the alleged punitive misconduct of the Hospital differently from that of Koyawala and Melvin. Tr. Vol. III (March 9, 2006) at 184. Plaintiff conceded that there "could be a post-trial remedy" available to the Hospital if this approach ultimately proved erroneous. *Id.* at 182. On behalf of the Hospital, Mr. Hayhurst noted his disagreement with the course of action. *Id.*

instruction,[17]] because that's going to create more confusion without further help. My initial thought would be that the hospital is liable for punitive damages against them but not liable for punitive damages against Koyawala and Melvin, but I may be wrong.

Mr. Hayhurst: I think the Court is right, but I would like the verdict form specifically to the jury or an instruction to tell the jury they can't consider the conduct of Koyawala or Melvin in determining whether Camden-Clark was guilty of punitive misconduct.

Mr. Regan: Well, he's gone as far as that can go, is to give the two separate lines that the Court has already agreed to.

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[17] The rejected instruction read as follows: "The hospital is not liable for punitive damages simply because Dr. Koyawala or Nurse Melvin may have acted in such a fashion as to justify an award of punitive damages against them absent an express authorization for the agents to engage in that misconduct or an express ratification of that misconduct." Tr. Vol. III (March 9, 2006) at 183. After denying the jury any opportunity to make this finding, the Circuit Court retrospectively – and improperly – made the finding itself. Post-trial Order at 11 ¶ 38. As is discussed *infra*, the lack of any *actual* agency between the Hospital and the anesthesia team renders the entire ratification question moot, because punitive damages cannot flow to the merely *apparent* principal of an *apparent* agent.

> **Mr. Hayhurst**: They are incomplete and misleading. Because if they say yes to both questions and award damages, we have no way of knowing whether they included the conduct of Melvin and Koyawala in the appraisement of Camden-Clark's conduct.
>
> * * *
>
> **The Court**: If you find that the conduct of Camden-Clark Memorial Hospital was separate and apart from the conduct of Dr. Koyawala and Nurse Melvin, CRNA Melvin, I'm just going to put Evelyn Melvin. And I'm going to put separate and apart. So, 11 would read, "Do you find that the conduct of Camden-Clark Memorial Hospital separate and apart from any conduct of Dr. Koyawala or Evelyn Melvin was so outrageous, wrongful or intentional that punitive damages should be awarded?" Is that agreeable?
>
> **Mr. Hayhurst**: Without waiving the position that I've already taken.

Id. at 187-89.

The verdict form's contortions over punitive damages were not the only problems with the way the case was submitted to the jury. Some of the

instructions were simply misleading, often because of a failure to carefully distinguish the Hospital's conduct from Koyawala's or Melvin's, or a failure to carefully describe the conditions under which the Hospital could be held liable for their conduct. For example, the Circuit Court gave the following instruction on informed consent:

> A doctor is required to reasonably disclose to his patient all material facts within the doctor's knowledge relating to the proposed treatment. ... Failure to so inform the patient is negligence. Therefore, if you find that Dr. Koyawala did not make such disclosure to Hilda Boggs before her consent was obtained, you should find *the defendant* liable for all injuries which resulted from the treatment administered. If you find that Mrs. Boggs did not give an informed consent, *the defendant is liable* for each and every unfavorable consequence of the procedure even if Dr. Koyawala performed the procedure appropriately. ...

Id. at 209-10 (in relevant part; emphasis added). Inasmuch as Camden-Clark was the only defendant at trial, it is arguable that the jury could have interpreted this instruction as simply directing liability against it for Dr. Koyawala's actions.[18] The

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[18] Ultimately, the jury did in fact find a lack of informed consent, but it also concluded that a reasonable person would not have refused the spinal anesthesia even if she had been fully informed.

instruction certainly misstates West Virginia law. *See Cross v. Trapp*, 179 W.Va. 459, 294 S.E.2d 446 (1982).

A similar degree of carelessness crept into this instruction on punitive damages:

> If you find, therefore, from the evidence that the defendant, Camden-Clark, or Dr. Koyawala, or Evelyn Melvin, acted with willfulness, wantonness and maliciousness or in any manner so wanton or reckless as to manifest a willful disregard for the rights of Ray and Hilda Boggs, in addition to compensatory damages, *you may award as punitive damages such further sums as you may think right in view of all of the circumstances of the case*. You are further instructed that for the plaintiff to recover punitive damages, actual malice need not be shown from the evidence, [if] you believe that the wrongful acts *of the defendant* were committed under such circumstances as to show a willful disregard of Ray and Hilda Boggs' rights, for in such cases the law infers malice.

Tr. Vol. III (March 9, 2006) at 216-17 (emphasis added). Again, the lack of specificity could have misled the jury into concluding that it was permissible to punish Camden-Clark for the actions of Koyawala or Melvin.

iv. Use of Wrongfully Disclosed Privileged Documents by Plaintiff During Closing Argument

During Plaintiff's closing argument, he of course squeezed all he could out of the errors described above. Plaintiff's counsel frequently referred to the privileged materials and re-emphasized their contents. But perhaps even more damaging was Plaintiff's equating Camden-Clark's justified (but failed) reliance on its various privilege arguments during the litigation with fraudulent concealment. Despite having earlier expressed skepticism about the propriety of these most improper arguments,[19] the Circuit Court left the door open for Plaintiff's counsel to advance them.

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[19] During the pretrial conference, the Circuit Court had seemed strongly disinclined to permit Plaintiff's counsel to advance such a misleading and prejudicial position:

> **Mr. Hayhurst**: Of the other issues that are before the Court for decision, I think there's only one from my standpoint that I think we need real guidance on at this structure and that is whether you're going to allow the Plaintiff to argue in support of its claims for fraud and tort of outrage, facts and occurrences that occurred after the complaint was filed, i.e. try Camden-Clark because of its litigation posture. Either we committed fraud or the tort of outrage before the suit was filed or we didn't. If we did, there's grounds to prosecute. If we didn't, there isn't grounds to prosecute. But I think the law is crystal clear –and I've supplied the Court with what authority I could find – events that occurred outside after the complaint was filed are not admissible to prove the existence of a cause of action that existed at the

As indeed he did. One of the very first things Plaintiff's counsel did in his closing was to link the fraudulent concealment claim to Camden-Clark's supplemental document production at trial:

> The first thing I want to talk to you about is the first question on that form. It deals with fraudulent concealment. The first question on the jury verdict form that you will consider, "Do you find that Camden-Clark Memorial Hospital fraudulently concealed information about Hilda Boggs' death from Ray Boggs?" And that's not going to be any surprise to you. I'm asking you to answer that question with yes, and I'll tell you why. The hospital

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> time the suit was filed. ... What he's trying – what he's trying to do is to try my conduct, and I'm not perfect and I'm not the best lawyer in the world.
>
> **The Court**: The hospital can't be held responsible for the trial lawyer's tactics...
> * * *
>
> **Mr. Hayhurst**: The issue is that my trial – my pre-trial conduct is not going to be part of this suit. Is that what the court's ruling is?
>
> **The Court**: Correct. ... We're not going to try Mr. Hayhurst's conduct.

Tr. (February 10, 2006) at 30-31, 33, 37. As this petition demonstrates, the Circuit Court's prediction proved most inaccurate.

> fraudulently concealed the truth about what happened to Mrs. Boggs by telling nurses to destroy notes, by giving the Boggs family a record that didn't tell the true story about what happened, *by hiding documents right up until the trial was going on in this case*, and by basically going along with Dr. Koyawala's plan to tell the same story or there was going to be trouble in this case.

Id. at 222-23 (emphasis added).

Plaintiff's counsel also derived significant benefit during his closing from the improperly disclosed privileged documents. He used Sheila Sleeth's witness interview summary to argue that the monitoring strips had been altered, and he used Bernice Burns' interview summary to argue that Ms. Burns' notes had been destroyed. *Id.* at 226-28. Plaintiff's counsel then proceeded to display the privileged witness interview summaries themselves to the jury. First, he brought up the Charlie Weedle summary:

> This is another big part of the fraudulent concealment in this case. ... This document was made by Sherry Johnson, the hospital's corporate representative. It has come into evidence before you so you can see it. And right there at the top of it, "Charlie states that he did" – it's talking about notes. It says, "Charlie states that he

> did this but made himself a copy. I have told him to destroy his copy." Ladies and gentlemen, I cannot bring you more clear-cut evidence of fraudulent concealment than the hospital's own corporate representative telling people who witnessed what happened to destroy their notes.

Id. at 232-33. In short, Plaintiff's counsel drew highly prejudicial conclusions from privileged documents that the Circuit Court should never have permitted him to have.

Plaintiff's counsel then continued to advance the misleading and erroneous arguments regarding peer review and fraudulent concealment to which he had earlier alerted the Circuit Court. As the following excerpt demonstrates, Plaintiff's counsel again advanced the theory that the fraudulent concealment claim should be based on the Hospital's reliance on the peer review privilege during litigation:

> I mean, every person suffers enough when they lose a loved one. It's one of the worst things that can possibly happen to you in your lifetime. But to compound it like this and mislead and obstruct and get rid of the evidence, I mean, *it continued right through this trial*. To put Mr. McGinty on the stand today to smile at you and say it's ok to destroy the evidence, and that this family has no right to know the truth,

> it's all peer review—let me say something about that, by the way. *Not one thing that is going into evidence before you is peer review, not one thing. The Court has determined that those things are not peer review*, which is the very reason that those things have come before you. So, *don't believe anybody who tells you that all of the facts are peer review*, and it's some kind of secret that they're entitled to keep. It is not. And the Court has already ruled that and provided that to us, so that we could tell you the truth about what happened. But they didn't want to tell the truth to Ray Boggs. They wanted everything behind the wall. They knew what they were on the hook for, they knew what they had done.

Id. at 235-36 (emphasis added).

Plaintiff's counsel also highlighted Dr. Koyawala's report card during his closing, arguing that it "shows the previous death that he was involved and the two other dangerous incidents," including "the one incident where a child needed to be intubated, [but] he couldn't do it. He had to call somebody else in to help him." *Id.* at 238-39.

Mr. Hayhurst was forced to defend against these prejudicial arguments one final time in his closing argument. In fact, he devoted a significant portion of his allotted time to rebutting these misleading assertions by Plaintiff's counsel.

For example, he discussed the privileged witness interview summaries; he disputed the assertion that the Hospital had fraudulently concealed documents by not turning them over until trial; and he attempted again to defend the wisdom of the peer review privilege. Tr. Vol. III (March 10, 2006) at 286-88, 295-296.

Plaintiff's counsel, of course, had the last word. He began by again invoking Dr. Koyawala's peer review "report card," but with a brand-new insinuation of wrongful concealment. Because the report card covered only the years from 1999 to 2001, he theorized that the Hospital must somehow be hiding or withholding earlier information:

> And [Mr. Hayhurst] told you, "Oh, there were never any other incidents or variances in all of these years from '94 to 2001." Now, if that were true, don't you think the hospital would have been the first ones to come in here and give you the complete report from '94 all the way through to whenever they say that he finally left in 2002? Of course, they would have. He wasn't somebody who only had these three problems the whole time he was there. This is only one small period. But they want to pull wool over your eyes, they want to tell you that he was cleared all of the time. These things are false.

Id. at 309. What was false was Plaintiff's insinuation. Ms. Carpenter testified without contradiction that the peer review tracking and trending system – which produces the "report cards" – was not even *started* until 1999. Tr. Vol. II (March 6, 2006) at 91. However, because Plaintiff's newfound insinuation was made in rebuttal argument, Camden-Clark had no opportunity to respond to it.

Plaintiff's counsel then hammered these improper suggestions home through the use of the privileged witness interview statements, stating:

> I can't put anything more clear-cut than that before you in terms of the fraudulent concealment. *It's their own documents that say they tell people to destroy notes*. . . . It's never the right thing to do to destroy the evidence. It's never the right thing to do to tell a nurse to get rid of her notes and then come to court years later and say, "Well, she's probably lying about those notes. We would never tell anybody to destroy anything." *Well, your own documents show that that is what you do*. It's beyond wrong.

Tr. Vol. III (March 10, 2006) at 313-14 (emphasis added). The documents to which Plaintiff's counsel referred are the witness interview summaries prepared by Ms. Johnston, in preparation for litigation, containing her personal thoughts and notes.

v. The Verdict and Judgment

The jury ruled for the defense in just a few particulars, notably that Koyawala and Melvin were not the Hospital's actual agents, and that the Hospital was not negligent in extending credentials to Koyawala. But it found the Hospital (as well as the non-parties Koyawala and Melvin) negligent in the underlying wrongful death claim, and it awarded economic damages of $650,000 and non-economic damages of $920,000. It also held the Hospital liable for both fraudulent concealment and outrage, awarding $100,000 and $375,000 on those claims. Finally, it awarded punitive damages of $3 million against the Hospital and a purported $1.5 million against the absent non-parties, Koyawala and Melvin.

vi. Post-trial Errors by the Circuit Court

The Circuit Court committed significant errors after the trial and in the Post-trial Order. Three warrant special mention. First, the Court erroneously denied Camden-Clark a full setoff of the amount paid in a pretrial settlement by former defendants Dr. Koyawala and UAI. Second, it ruled that the Hospital's post-trial motions were untimely. Finally, its analysis of the punitive damages award proceeded from a remarkable misconception, *i.e.* that the Hospital could be punished for simple negligence in causing Mrs. Boggs' death, and the Court then misapplied the factors relevant to a proper analysis. Factual details pertinent to these errors are provided *infra* where the errors are discussed.

III. Assignments of Error

I. The Hospital's post-trial motions were timely. The Circuit Court erred in holding otherwise and in failing to direct the Clerk to correct the civil docket to reflect the actual date of entry of the judgment.

II. The Circuit Court erroneously ordered the production of, and permitted Plaintiff to use, confidential peer review materials statutorily protected from such disclosure.

III. The Circuit Court erroneously ordered the production of, and permitted Plaintiff to use, confidential attorney-client communications and trial preparation materials protected from disclosure by W.Va. R. Civ. P. 26(b)(3).

IV. The Circuit Court permitted Plaintiff to submit an untenable claim of intentional spoliation of evidence to the jury under the guise of claims of outrage and fraudulent concealment.

V. The Circuit Court erroneously permitted the Plaintiff to recover damages for the same injury twice through the use of two legal theories for the same harm.

VI. The tort of outrage cannot lie on these facts, and the Circuit Court erred in submitting the issue to the jury and failing to set aside the jury's verdict.

VII. The tort of fraudulent concealment cannot lie on these facts, and the Circuit Court erred in submitting the issue to the jury and failing to set aside the jury's verdict.

VIII. The instructions and verdict form were erroneous and misleading.

IX. The Circuit Court improperly denied the Hospital a full set-off of the amount paid in a pretrial settlement by former defendants Manish Koyawala and United Anesthesia, Inc.

X. Because all non-economic damages awarded against the Hospital are subject to the applicable Medical Professional Liability Act (MPLA) cap of $1 million, the Circuit Court erred in entering judgment in excess of that cap.

XI. The Circuit Court improperly permitted the jury to award duplicative – indeed triplicative – punitive damages against the Hospital, in violation of the rule of *Tudor v. Charleston Area Medical Center, Inc.*, 203 W.Va. 111, 506 S.E.2d 554 (1997).

XII. Because the Hospital's conduct did not satisfy the test stated in syllabus point 4 of *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895), the Circuit Court erred in submitting the issue of punitive damages to the jury and failing to set aside the jury's verdict.

XIII. Punitive damages may not be awarded vicariously against the ostensible "principal" of a merely ostensible agent.

XIV. The Circuit Court failed to properly conduct the post-trial review of the jury's punitive damages award required by the due process clauses of the state and federal constitutions and this Court's decision in *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

XV. The punitive damages award against the Hospital violates the Hospital's right to substantive due process of law under the state and federal constitutions.

IV. Argument

A. Preliminary Matters

i. Because the Judgment Includes an Award of Punitive Damages, Due Process Requires Full Appellate Review

This petition asks for the Court's review of a substantial assessment of punitive damages, and the petition can, should, and indeed *must* be granted for that reason alone. Appellate review of an award of punitive damages is an essential component of procedural due process. *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 n.9 (2001) ("[W]e [have] emphasized the importance of appellate review to ensuring that a

jury's award of punitive damages comports with due process."). In this regard, this Court has committed itself to "meaningful and adequate" review of every punitive damages award. *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897, 908 (1991); *see Cooper Industries*, 532 U.S. at 443 (due process requires *de novo* review of punitive damages awards). Although the Court has reserved the right to conduct its review on the petition alone, *see* syl. pt. 5, *Garnes*, the Hospital submits that, in light of the United States Supreme Court's subsequent holding in *Cooper Industries*, it is now clear that adequate procedural due process requires the plenary review of a full appeal. Indeed, that Court has since restated and emphasized this point:

> We reiterated the importance of [the *Gore*[20]] guideposts in *Cooper Industries* and *mandated* appellate courts to conduct *de novo* review of a trial court's application of them to the jury's award. Exacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice.

State Farm Mutual Automobile Insurance Co. v. Campbell, 538 S.Ct. 408, 418 (2003) (emphasis added; citations and quotation omitted). Because this Court's denial of a petition for appeal is not even

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[20] *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)

an expression of the Court's view of the merits,[21] such a denial would not fulfill the Court's mandatory duty to perform an "exacting" *de novo* review applying the *Gore* guideposts. Hence, this petition must be granted.

ii. The Hospital's Post-Trial Motions were Timely

Echoing its stated opinion at the hearing on the Hospital's post-trial motions, the Circuit Court ultimately held that those motions had been untimely filed. Post-trial Order at 4-7 ¶¶ 15-27. As is described in the Hospital's first petition, it was the announcement of this potential (and erroneous) holding that compelled the filing of the first petition notwithstanding the lack of a written order denying the motions.

The Circuit Court erred. Rules 50 and 59 each require that a motion pursuant thereto shall be filed no later than ten days after the "*entry* of the judgment." W.Va. R. Civ. P. 50(b), 59(b) (emphasis added). "Entry" of judgment is specifically and clearly defined by the rules: "The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry." W.Va. R. Civ. P. 58 (in pertinent part).

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[21] *See In re Nat'l Bank of Wheeling*, 137 W.Va. 673, 73 S.E.2d 655, 667 (1952) (overruled in part on other grounds, *In re Kanawha Valley Bank*, 144 W.Va. 346, 109 S.E.2d 649 (1959)).

Entry is therefore an event distinct from the mere announcement or rendition of judgment. "There has been some confusion in distinguishing the rendition of the judgment from entry of the judgment. That is, the pronouncement of judgment by the court on one hand as distinguished from the entry of the judgment into the official records." *State v. Mason*, 157 W.Va. 923, 205 S.E.2d 819, 822 (1974). "Entry of an order requires more than the signature endorsement of the adjudicatory official." *Echard v. City of Parkersburg*, 187 W.Va. 350, 419 S.E.2d 14, 16 (1992).[22] The distinction drawn by the rules has important purposes:

> [Courts have] deemed it essential that the judgment be entered in the civil docket before the judgment was final for purposes of appeal.
>
> While this at first blush might appear to be excessively formal, it is obvious on close examination that such a rule is necessary so that parties may effectively determine rights .... [such as] *the time for appeal and the making of post-judgment motions.*

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[22] The *Echard* Court observed that were it otherwise, "the signer could sign the order and withhold it from the affected parties until the ... [applicable] appeal period had passed." *Id.* Although that example is the extreme one, the rules are nonetheless clear that any delay between endorsement and entry cannot work to impair rights that arise only upon actual entry.

Mason, 205 S.E.2d at 822 (emphasis added; quotation omitted). Accordingly, "[i]n a proceeding governed by the Rules of Civil Procedure, a judgment rendered in such proceeding is not final and effective until entered by the clerk in the civil docket as provided in Rule 58 and Rule 79(a) of the Rules of Civil Procedure." Syl. pt. 4, *State v. Mason*.

The "civil docket" is in turn described in Rule 79(a) (emphasis added).

> The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Supreme Court of Appeals, and shall enter therein each civil action to which these rules are made applicable. ... All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. ... *The entry of an order or judgment shall show the date the entry is made*. ... .

W.Va. R. Civ. P. 79(a) (in pertinent part; emphasis added).

It is undisputed here that, although the civil docket states that judgment was entered on April 28, 2006, the docket is incorrect – April 28 is simply the date that the judgment was signed by

Judge Waters; *it is not* the date on which the Clerk entered judgment in the manner described by Rules 58 and 79. Instead, according to the undisputed affidavit of Deputy Circuit Clerk Barbara S. Forshey, entry did not occur until Wednesday, May 3, 2006. Forshey Affidavit (Aug. 23, 2006) at ¶ IV. Camden-Clark not only demonstrated this fact to the Court without contradiction, but it also asked the Court pursuant to Rule 60(a) to order the correction of the civil docket so that the actual May 3 entry date is reflected therein. Rule 79(a) imposes a ministerial duty on the clerk of court who "*shall* show the [actual] date the entry is made," and the Hospital is therefore plainly entitled to that relief.

The Circuit Court nonetheless rejected the evidence and held that the order was entered on April 28. Its reasons were faulty. For example, the Court belittled Ms. Forshey's affidavit because Mr. Hayhurst had drafted it for her execution. Post-trial Order at 7 ¶ 26. But lawyers very often draft affidavits for witnesses who have no experience in doing so for themselves, and a draft is a nullity unless endorsed and *sworn to by the witness*. Thus, to reject the truth of Ms. Forshey's affidavit is tantamount to accusing a court officer of false swearing. The Circuit Court also posited that the affidavit lacked "supportive evidence." *Id.* It is unclear why "supportive evidence" would be needed in the first place. The affidavit was competent evidence for disposition of a motion, *see* W.Va. R. Civ. P. 43(e), and again it was undisputed.

At any rate, the affidavit did have "supportive evidence." The copies of the judgment

that were certified by the Clerk and forwarded to counsel state on their face that they were certified *on May 3*, which directly corroborates Ms. Forshey's sworn statement. Rule 77(d) provides that "*[i]mmediately* upon the entry of an order or judgment the clerk ... shall serve by mail a notice of the entry in the manner provided for in Rule 5 ... and shall make a note of the mailing in the docket." W.Va. R. Civ. P. 77(d) (emphasis added). As Ms. Forshey swore under oath, the Clerk did so "immediately" here – but on May 3, not April 28.

Finally, the Court appears to have reasoned that the docket sheet is infallible simply because it is the docket sheet. Post-trial Order at 7 ¶ 26 & n.3. This reasoning is directly at odds with Rule 60(a), which contemplates not only that circuit clerks can make mistakes, but that such mistakes may be corrected. In a rather hyperbolic footnote, the Court even suggested that the Hospital proposed that "every court record [statewide] was wrong." *Id.* Of course the Hospital argued no such thing. The point is not that "every court record" is wrong, but rather that *this one* is. Finally, although it apparently is the (erroneous) practice of the clerk in Wood County to note the date of the judge's signing as the date of "entry" even when the two are not the same, there is no basis for the Circuit Court's speculation that every clerk in every circuit fails to comply with Rules 58 and 79. Entry of judgment occurred on May 3, 2006.

The Hospital's post-trial motions were therefore timely, because they were filed on Tuesday, May 16, 2006, two full days *before* the ten-

day period after the May 3 entry. May 6 and 13 were Saturdays, May 7 and 14 were Sundays, and May 9 was Election Day. Under W.Va. R. Civ. P. 6(a), none of these days is counted where a "period of time prescribed or allowed by these rules ... is fewer than 11 days[.]" Such a clear and unambiguous rule of civil procedure, like a statute, is not construed, but rather is applied according to its terms. *Mason*, 205 S.E.2d at 823; *see* Wright, Miller & Kane, 11 Fed. Prac. & Proc. Civ.2d § 2812 n.13 ("The usual rules on computation of time, stated in Rule 6(a), apply [to motions for a new trial].") (discussing substantively identical federal rules). Because these five days are excluded from the computation of time, the deadline for Camden-Clark's motions was May 18, 2006.[23]

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[23] In a footnote, the Circuit Court speculated that perhaps Rule 59's deadline is calculated in calendar days. Post-trial Order at 5 ¶ 20 n.3. In fact, it once was – but not any more. Effective April 6, 1998, W.Va. R. Civ. P. 6(a) was amended to make it substantively consistent with the corresponding federal rule, which had been in effect since 1985. This change made more statutory and rule-based time limits subject to computation by business days only. Before this amendment, time was calculated on a calendar-day basis unless the prescribed period was less than *seven* days; the amendment increased the boundary to those periods less than eleven. Hence, by its terms, Rule 6(a)'s special rule for short deadlines *did not apply* to post-trial motions until 1998.

This rule change rendered all of the cases cited in ¶ 22 of the Post-trial Order mere historical curiosities. Aside from their predating the operative rule, three of these cases sported other stark distinctions from this case. *See Miller v. Triplett*, 203 W.Va. 351, 507 S.E.2d 714 (1998) (appellants had failed to make *any* Rule 59 motion, so timeliness and time computation are not discussed); *State v. Legg*, 151 W.Va. 401, 151 S.E.2d 215 (1966) (a *criminal* case dealing with a sixty-day period for

B. Errors Requiring a New Trial

i. The Circuit Court Erroneously Ordered the Production of, and Permitted Plaintiff to Use, Confidential Peer Review Materials Statutorily Protected from Disclosure

Like the federal government[24] and most other states, West Virginia has enacted legislation aimed at improving the quality of health care by encouraging thorough and effective peer review by and for physicians and other health care professionals. *See* W.Va. Code §§ 30-3C-1 through -4. Our statute broadly defines "peer review" as the procedure for evaluation by health care professionals

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filing a notice of intent to appeal, citing Rule 59 as a "somewhat analogous situation); *Boggs v. Settle*, 150 W.Va. 330, 145 S.E.2d 446 (1965) (merely states as general proposition that ten-day period is mandatory and cannot be extended). The other case cited in ¶ 22, *Sothen v. Continental Assurance Co.*, 147 W.Va. 458, 128 S.E.2d 458 (1962), actually supports the Hospital's position that only notation of judgment in the civil docket constitutes the judgment's entry.

Finally, *Roberts v. Consolidation Coal Co.*, 208 W.Va. 218, 539 S.E.2d 478 (2000), is not to the contrary. The proper means of computation was not at issue in *Roberts*, inasmuch as the Rule 59 period had run however it was calculated, and the Court's mention of the due date was a mere *obiter* remark. Indeed, the Court's ultimate ruling actually sapped the strictness of the supposedly "mandatory" time limit by allowing a stipulated (and ordered) extension to have effect as an "invited error."

[24] Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152.

of the quality and efficiency of services ordered or performed by other health care professionals, including practice analysis, inpatient hospital and extended care facility utilization review, medical audit, ambulatory care review, claims review and patient safety review.

§ 30-3C-1. The statute next defines a "review organization" as "*any* committee or organization engaging in peer review[.]" *Id.* (emphasis added). Moreover, lest "any" be misunderstood, the Legislature provided a lengthy list of examples of such organizations, many of which are also broadly defined. *See* W.Va. Code § 30-3C-1.

Having defined the subject and the players, the Legislature turned to fostering vigorous and constructive peer review. Its approach was two-fold: immunity and confidentiality. Immunity is treated in § 30-3C-2, but it is of no moment here. The statute's confidentiality provision is, however, very much at issue, and the Hospital submits that the Circuit Court plainly ran afoul of it. The statute commands as follows:

> *The proceedings and records of a review organization shall be confidential and privileged and shall not be subject to subpoena or discovery proceedings or be admitted as evidence in any civil action arising out of the matters which are subject to evaluation and review by such organization* and no person who was in attendance at a meeting of such organization shall be permitted or

> required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such organization or as to any findings, recommendations, evaluations, opinions or other actions of such organization or any members thereof: Provided, That information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action merely because they were presented during proceedings of such organization, nor should any person who testifies before such organization or who is a member of such organization be prevented from testifying as to matters within his knowledge, but the witness shall not be asked about his testimony before such an organization or opinions formed by him as a result of such organization hearings: Provided, however, That an individual may execute a valid waiver authorizing the release of the contents of his file pertaining to his own acts or omissions, and such waiver shall remove the confidentiality and privilege of said contents otherwise provided by this section[.]

W.Va. Code § 30-3C-3 (in relevant part).

> This confidentiality provision is essential to the Legislature's aims:
> [I]t seems evident that the legislature enacted these provisions with the ultimate purpose of improving the quality of medical care provided in the hospitals of this State. The confidentiality provision was undoubtedly placed in the peer review law for the same reason that most other states have created some type of privilege protecting peer review proceedings from disclosure.

Daily Gazette Co. v. West Virginia Bd. of Medicine, 177 W.Va. 316, 352 S.E.2d 66, 71-72 (1986).

Moreover, the Legislature chose peer review confidentiality knowing full well that evidence potentially helpful to demonstrate professional negligence by a provider would remain hidden from injured patients and the courts. "'[T]he purpose of this legislation is not to facilitate the prosecution of malpractice cases. Rather, its purpose is to ensure the effectiveness of professional self-evaluation, by members of the medical profession, in the interest of improving the quality of health care.'" *Daily Gazette*, 352 S.E.2d at 72 (quoting *Jenkins v. Wu*, 102 Ill.2d 468, 468 N.E.2d 1162, 1168-1169 (1984)). "The peer review privilege represents a legislative choice between medical staff candor and the public's access to evidence." *State ex rel. Shroades v. Henry*, 187 W.Va. 723, 421 S.E.2d 264, 268 (1992). That choice was the Legislature's to make.

Although this Court does not sit to review the wisdom of this statute, the Legislature's reasoning is clear, persuasive, and good public health policy. This Court has already so recognized. "'Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.'" *Daily Gazette*, 352 S.E.2d at 72 n.12 (quoting *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970)).

One other important feature of peer review confidentiality bears mention here. The Hospital is not merely *empowered* to hold peer review materials confidential, it is *obligated* to do so.

> To effect a waiver of the privilege of confidentiality which attends information and records properly the subject of health care peer review under West Virginia Code §§ 30-3C-1 to -3 (1993), the Legislature has required that an *individual* must formally indicate his intent to waive this confidentiality by executing a valid waiver.

Syl. pt. 3, *Young v. Saldanha*, 189 W.Va. 330, 431 S.E.2d 669 (1993) (emphasis added). Hence, the Hospital is powerless to waive the privilege of confidentiality as regards the peer review of a given medical professional. Only the "individual" who is the subject of the review may do that.

Much of the Circuit Court's confusion in this case appears to have arisen from the statute's proviso that mere submission of a document to a review organization does not render it privileged if it otherwise is available from a non-privileged "original source." This Court has observed that generally "the origin of the document determines if it is privileged." *Shroades*, 421 S.E.2d at 269 (footnote omitted). In many or most cases, this observation is quite true. Review organizations often examine ordinary medical and other records that are created not by or for the organization, but for entirely independent purposes.

But documents that have no such independent purpose – *i.e.* documents created *for* the use of a review organization – are privileged even when they are not created *by* the organization itself. This principle is well illustrated by *State ex rel. Charles Town General Hospital v. Sanders*, 210 W.Va. 118, 556 S.E.2d 85 (2001). In *Charles Town*, the question presented was whether documents generated during credentialing, including applications for issuance or renewal of staff privileges, were subject to the statutory privilege.[25]

This Court readily concluded that a staff credentialing committee is a "review organization" under the broad statutory definition. 556 S.E.2d at 92. Accordingly, the statutory privilege clearly shielded documents generated internally by the committee. More "problematic" for

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[25] The Court expressly observed that it had not considered this question in deciding *Shroades*. 556 S.E.2d at 92.

the Court, however, were the applications for privileges themselves. These were, of course, created by the applicants rather than the credentialing committee. On the other hand, they "*would not have been created but for the hospital's review organization* ... whose original records are, in fact, entitled to the statutory privilege." 556 S.E.2d at 93 (emphasis added).

The Court held that the purpose of the documents was the deciding factor. Because the applications were created in order to be peer-reviewed, this Court was persuaded that logically they must share the privilege as well.

> [I]t would be incongruous to find that applications for staff privileges or the renewal thereof are not protected by the peer review privilege simply because they are created by individuals who are not, themselves, members of the hospital's credentialing committee. Rather these applications are as integral a part of the hospital review organization's proceedings as are those records generated exclusively during the committee's consideration of the subject documents, and indeed, perhaps even more crucial since the applications, themselves, often provide the starting point for the committee's deliberations.

Charles Town, 556 S.E.2d at 93. Hence, the Court upheld the privilege as regards the applications, and it fashioned this syllabus point:

> An application for the issuance or renewal of staff privileges that is created solely for consideration by a hospital credentialing committee is protected by the health care peer review privilege pursuant to W.Va. Code § 30-3C-1 (1980) (Repl. Vol. 1998).

Syl. pt. 8, *id.*

Though the immediate context of this holding involved applications for privileges, its reasoning must surely govern here. Documents that are created and exist only because they are needed or useful for peer review are privileged. The "original source" proviso does not reach them. Hence, documents such as the handwritten accounts written by employees *at* Ms. Carpenter's request *for* the root cause analysis are confidential peer review documents.

Moreover, and at any rate, much of the confidential material disclosed to Plaintiff plainly originated within the peer review process itself and could not even arguably be deemed to be within the "original source" proviso. For example, Dr. Koyawala's "report card" is a core peer review document; the root cause analysis meeting notes are as well.

This Court's words from *Daily Gazette Co.* bear repeating: "[T]he purpose of this [peer review] legislation is not to facilitate the prosecution of malpractice cases." 352 S.E.2d at 72 (quotation omitted). Here, peer review materials did much more than merely "facilitate" Plaintiff's case; they largely became his case, and the Hospital's good-faith attempts to obey the statute brought a seven-figure liability upon it. The judgment must be reversed for this reason alone.

ii. The Circuit Court Erroneously Ordered the Production of, and Permitted Plaintiff to Use, Attorney-Client Communications and Trial Preparation Materials Protected from Disclosure by Rule 26(b)(3)

In addition to permitting the invasion of private peer review documents, the Circuit Court also erred when it ordered the production of materials prepared by or under the purview of Sherry Johnston. Ms. Johnston is the Hospital's Director of Risk Management. She reports to its general counsel, Todd Kruger, and she undertook an investigation of Mrs. Boggs' surgery and death at the direction of both Mr. Kruger and outside counsel when the prospect of litigation arose.[26] Tr. (August 3, 2005) at 7-8. In the course of her investigation, Ms. Johnston interviewed witnesses and drafted summaries of these interviews, which included her analysis and impressions gleaned from the interviews, expressly to assist the Hospital's lawyers

[26] This prospect arose very quickly. As was noted above, the Boggs family was represented by counsel within two or three days of the surgery. Tr. Vol. II (March 8, 2006) at 347.

in assessing and managing the litigation. Tr. (August 3, 2005) at 10-11 ("Mr. Hayhurst: ... Mrs. Johnston has interviewed witnesses and put down her own mental thoughts and impressions for the purpose of communicating the relevant information that those witnesses imparted to me so that I may assess the hospital's position.").

Under these circumstances, the documents prepared by or for Ms. Johnston were protected from disclosure under the attorney-client privilege, W.Va. Civ. P. 26(b)(3), or both. The Circuit Court's holding otherwise rested on the erroneous premise that only the Hospital's outside lawyer, or direct agents of that outside lawyer, could create protected trial preparation materials. Simply because Ms. Johnston is an employee of the Hospital, the Circuit Court held that the materials were not protected. Tr. (August 3, 2005) at 24 ("The Court: ... I do not believe work done by Ms. Johnston, a hospital employee, would be considered work product."); Order (August 3, 2005) at 3 ("Questions Sherry Johnston was asked regarding her investigation into what happened to Mrs. Boggs are proper and do not infringe on the work-product exception to discovery. The Court finds that Mrs. Johnston is not an employee of the Hospital's counsel[.]"). The Court erred.

Why? First, and most simply, many of the summaries are on their face communications from Ms. Johnston, on behalf of the Hospital, to Mr. Hayhurst. Organizations can communicate with lawyers only through agents authorized to do so, and Ms. Johnston was clearly such an authorized person.

Hence, the communications should be and are shielded by the attorney-client privilege. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981).

Second, the protections of Rule 26(b)(3) plainly embrace all materials created by or for a *party*, and not just by or for its lawyer:

> Trial preparation: materials. – Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another *party* or by or for that other *party*'s representative (including the *party's* attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

W.Va. R. Civ. P. 26(b)(3) (in relevant part; emphasis added).

This rule makes good sense. It is of course commonplace for a party facing the prospect of litigation to prepare to meet that prospect. When that party is an organization, its lawyer – in-house or outside – almost always needs the assistance of employees of the organization to help him or her investigate, gather information, and develop a plan of action. During the ensuing lawsuit, employees of the party may again be called upon to assist with developing or responding to discovery, to provide information necessary to the lawyer's strategic and tactical decisions, and to perform such diverse other tasks as may arise in the modern lawsuit. The rules of civil procedure have evolved to recognize this reality and to protect the work product that is thereby generated. This Court so stated over twenty years ago:

> Rule 26(b)(3) of the West Virginia Rules of Civil Procedure is identical to the federal rule, which was adopted in 1970 as part of a larger reorganization of the discovery section of the Federal Rules of Civil Procedure. The purpose of Rule 26(b)(3) is to *narrow* the ability to obtain trial preparation materials *by expanding the coverage of the work product rule to include persons other than an attorney*.

Syl. pt. 6, *In re Markle*, 174 W.Va. 550, 328 S.E.2d 157 (1985) (emphasis added; holding that report

prepared by employee of the Judicial Investigation Committee, which consisted of summaries of interviews with nine witnesses, was entitled to protection under Rule 26(b)(3)); *see also id.*, 328 S.E.2d at 163 (collecting federal cases extending work product or Rule 26(b)(3) protection to investigators, a physician, accountants, economists, a foreign patent agent, and marine surveyors).[27]

Hence, whether Ms. Johnston was a Hospital employee or an agent of outside counsel was a question of no consequence. In either capacity, she could create party work product protected by Rule 26(b)(3), as indeed could a far broader class of persons of whom she is just one example.

Accordingly, the only remaining inquiry is whether the documents were prepared in

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[27] Because the language of the state and federal rules is identical, this Court gives "due consideration" to analogous federal case law. *State ex rel. United Hosp. Ctr. v. Bedell*, 199 W.Va. 316, 484 S.E.2d at 210 n.15. The federal courts clearly read Rule 26(b)(3) as expansively as it is written. "For purposes of the rule, it is irrelevant whether [the document preparer] was retained by defendant's attorneys, as defendant alleges, or by defendant, as plaintiff contends. Work product protection, if applicable here, lies in favor of the party, its lawyers and agents." *Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 708 (S.D.N.Y. 1979); *see Bunting v. Gainsville Mach. Co.*, 53 F.R.D. 594 (D. Del 1971) (observing that Rule 26(b)(3)'s protection is "intended to encompass documents prepared by a *party* or someone acting on *its* behalf to aid that *party* in the litigation") (emphasis added); *see generally* 8 Wright, Miller, & Marcus, Fed. Prac. & Proc. Civ.2d § 2024.

anticipation of litigation. This Court has described the inquiry as follows:

> To determine whether a document was prepared in anticipation of litigation and, is therefore, protected from disclosure under the work product doctrine, the primary motivating purpose behind the creation of the document must have been to assist in pending or probable future litigation.

Syl. pt. 7, *State ex rel. United Hospital Center, Inc. v. Bedell*, 199 W.Va. 316, 484 S.E.2d 199 (1997); *see id.*, 484 S.E.2d at 213-214 (investigative report was subject to work product immunity where counsel "conducted the investigation primarily out of concern for the hospital's exposure to liability"). The answer to this question is easy – the prospect of litigation was not merely the "primary," but indeed the *only*, reason that Ms. Johnston's documents were prepared at all.

That answer should end the inquiry with a finding that the documents are protected. The Hospital must, however, also point out that the protected documents put to most prejudicial use by Plaintiff were the quintessential example of protected work product – notes of statements taken from available witnesses. Indeed, the narrower common-law work product doctrine had its very genesis in a case involving witness statements. *See Hickman v. Taylor*, 329 U.S. 495 (1947). This Court's *Markle* decision, in which the breadth of

modern Rule 26(b)(3) was emphasized, involved such statements as well.

Moreover, proper application of the law would have caused no unfair prejudice to Plaintiff. Interviewing a witness obviously does not render her identity secret or immunize her from repeating her recollections under oath. All witnesses were identified for Plaintiff, and he deposed all those he wished to depose. There was simply no justification for permitting him to also invade and inspect the Hospital's confidential legal files.

In sum, the trial court's rulings punished the Hospital for doing what anyone concerned about potential litigation ought to do – investigate the facts. By then permitting the Hospital's reasonable and lawful withholding of its trial preparation materials to be painted as some sort of fraud or cover-up – indeed as a ground for the award of *punitive* damages – the Court greatly compounded this prejudice.

iii. Plaintiff Should Not Have Been Permitted to Merge an Untenable Spoliation of Evidence Claim into his Claims for Outrage and Fraudulent Concealment

In *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003), this Court first recognized an independent tort for spoliation of evidence, subject to various limitations therein described. The new cause of action will lie against a party to a lawsuit if spoliation is intentional and the following elements are present:

> (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) *the spoliated evidence was vital to a party's ability to prevail* in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) *the party's inability to prevail in the civil action*; and (7) damages.

Syl. pt. 11, *id.* (emphasis added).

Plaintiff pled a spoliation claim here, but, at the close of the evidence, he chose not to ask that it be submitted to the jury. There is little mystery about this choice; otherwise, because of the materiality elements emphasized above, he would have had to argue to the jury that he could not win his primary claims.[28]

Nonetheless, in support of his other claims, Plaintiff proceeded to argue that the Hospital had tampered with or destroyed evidence. These arguments were unfair and prejudicial. In *Hannah*, this Court recognized a particular tort and gave it specific contours and circumscriptions. Plaintiffs'

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[28] A second very good reason for Plaintiff to have dropped this claim is that it had no factual basis. With the possible exception of notes allegedly prepared by Bernice Burns (of which the Hospital has no knowledge), everything that Plaintiff accused the Hospital of "destroying" was quite extant, in Plaintiff's possession, and used by him at trial.

arguments permitted him to ignore the boundaries set by the Court and to recover damages for spoliation without establishing the materiality elements required by law.

iv. The Verdicts for Outrage and Fraudulent Concealment Constitute a Double Recovery

"'A plaintiff may not recover damages twice for the same injury simply because he has two legal theories[.]'" *Harless v. First Nat'l Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d 692, 705 (1982). Plaintiff did so here.

Mr. Boggs could draw no material distinction between the alleged conduct underlying his claims of fraudulent concealment and outrage. Consider the following excerpts from his counsel's closing argument:

> The Hospital fraudulently concealed the truth about what happened to Mrs. Boggs by telling nurses to destroy notes, by giving the Boggs family a record that didn't tell the true story about what happened, by hiding documents right up until the trial was going on in this case, and by basically going along with Dr. Koyawala's plan to tell the same story or there was going to be trouble in this case.

Tr. (3/9-3/10/06) at 222-223.

> I think this conduct is outrageous. To tamper with medical records, to mislead the family about the dreadful circumstances of what happened to Mrs. Boggs is outrageous. No person should be lied to and deceived about what happened to their loved one when they passed away under circumstances like this. It is beyond all possible bounds of decency to do that.

Id. at 234-235. The Hospital respectfully submits that a review of the record will demonstrate to the Court that these excerpts are characteristic of Plaintiff's argument and position below.[29] His claims were duplicative, and he should not have been awarded damages twice for the same injury.

v. The Claim of Fraudulent Concealment Rests on Inadmissible and Irrelevant Evidence and Must Be Reversed

The judgment on Plaintiff's claim for fraudulent concealment is infirm and must be reversed, for several distinct reasons.

First of all, this claim largely rested on the very evidence that the Circuit Court erroneously

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[29] At the close of evidence and in response to the Hospital's motion for a directed verdict on the outrage claim, Plaintiff's counsel directly equated that claim with the alleged fraudulent concealment, stating: "Not giving this family the facts about what happened to Mrs. Boggs is along the same lines, Your Honor. I certainly think that rises to the tort of outrage level." Tr. Vol. III (March 9, 2006) at 161.

permitted Plaintiff to have and use: documents protected from disclosure by Rule 26(b)(3) and/or the statutory peer review privilege. As is discussed above, the Hospital should not have been required to disclose these documents, and it cannot be tortious – let alone fraudulent – for a party to conceal what it has every right to conceal. Moreover, even if the Hospital were wrong as regards some of its assertions of privilege or right of nondisclosure, its positions were taken on what is plainly a nonfrivolous construction and application of the law. Any such errors are remediable through the rules of civil procedure, but they are not torts.

Second, the Hospital's positions on privilege issues were taken during the litigation itself. "A cause of action must be based on facts that exist prior to the institution of the action." *Harless*, 289 S.E.2d at 696 n.6. The proper procedural vehicle for a plaintiff who wishes to rely on post-complaint transactions, occurrences, or events is a supplemental complaint under W.Va. R. Civ. P. 15(d). *See* syl. pt. 3, *Jones v. Jones*, 184 W.Va. 297, 400 S.E.2d 305 (1990). No supplemental complaint appears here, and consequently Plaintiff should not have been permitted to rely on these matters at trial.

Third, because Plaintiff could not prove an affirmative fraud based on an actual misrepresentation, he resorted to a claim of fraudulent concealment. But one charging another with fraudulent concealment must demonstrate an affirmative duty for the other party to speak in the first place. *See Trafalgar House Const., Inc. v. ZMM, Inc.*, 211 W.Va. 578, 567 S.E.2d 294, 300 (2002)

("Fraudulent concealment involves the concealment of facts by one with knowledge or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud." (citing *Silva v. Stevens*, 156 Vt. 94, 589 A.2d 852, 857 (1991)). Silence is not a tort absent such a duty. *See Pocahontas Mining Co. Ltd. Partnership v. Oxy USA, Inc.*, 202 W.Va. 169, 503 S.E.2d 258, 264 (1998) (Workman, J., concurring) ("The law states that in order for silence to be an actionable fraud, facts must be averred which give rise to a duty to speak." (quoting *Jim Walter Homes, Inc. v. Waldrop*, 448 So.2d 301, 306 (Ala. 1983)).

In this case, Plaintiff cited no law and introduced no evidence demonstrating that the Hospital had any such affirmative duty. To the contrary, the record shows that Mrs. Boggs' attending physicians bore the duty and responsibility of advising the family regarding her condition and treatment. Tr. Vol. III (March 9, 2006) at 123. In fact, a hospital risks inappropriately interfering in the physician-patient relationship if it undertakes to bypass the physician and disclose information on its own initiative. *Id.* at 123-126; *cf. Cross*, 294 S.E.2d at 459 (the informed consent process is between physician and patient, and it "could easily be disrupted rather than facilitated by the involvement of hospital personnel").

Notwithstanding the lack of a duty to speak, the Hospital did much to assure that the Boggs family got the information it wanted. It accommodated meetings with Mrs. Boggs' caregivers, one of which was taped and transcribed.

Tr. Vol. II (March 8, 2006) at 347-48. Against its usual policy, it provided the family with a copy of her "open" (*i.e.* still-incomplete) medical record, as well as a complete copy of the final record. Tr. Vol. II (March 6, 2006) at 32, 39-41; Vol. II (March 8, 2006) at 354, 357. Indeed, Mr. Boggs identified no specific instance in which the Hospital denied one of his requests in that regard. *Id.*

The fraudulent concealment claim should not have gone to the jury, and the verdict and judgment adverse to the Hospital must be reversed.

vi. The Tort of Outrage Cannot Lie as a Matter of Law

The Circuit Court also erred in submitting the issue of the tort of outrage to the jury, and for failing to set aside the resulting verdict against the Hospital on that claim. Again, the judgment on this claim should be reversed for reasons already discussed, because it was based largely on the Hospital's lawful withholding of privileged and protected documents. Again, it rested on post-complaint events without any supplemental complaint. Third, as was also discussed above, Plaintiff relied on the same allegations and sought the same damages for outrage and fraudulent concealment, and he is not entitled to a double recovery because he has two legal theories.

On a more fundamental level, though, there could never have been a viable claim of outrage on these facts. Inasmuch as no physical injury is required in order to state a claim, "the tort of

outrage is a slippery beast, which can easily get out of hand without firm judicial oversight." *Keyes v. Keyes*, 182 W.Va. 802, 392 S.E.2d 693, 696 (1990). The Hospital respectfully submits that the beast slipped very far afield here. A review of the law will quickly show why.

The tort of outrage (a/k/a intentional infliction of emotional distress) requires proof of four elements:

> (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Syl. pt. 3 (in part), *Travis v. Alcon Labs., Inc.*, 202 W. Va. 369, 504 S.E.2d 419 (1998).

The first of these elements sets "a high standard indeed"[30]:

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[30] *Keyes*, 392 S.E.2d at 696.

> "It [is not] enough that the defendant has acted with an intent which is tortious or even criminal, or that he intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. *Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.*"

Tanner v. Rite Aid of West Virginia, Inc., 194 W.Va. 643, 461 S.E.2d 149, 156-157 (1995) (emphasis added by the Court; quoting Restatement (Second) of Torts § 46, comment (d)).

Such "*unprecedented* and extreme misconduct"[31] – transgressing as it must the outermost tolerance of civilized society – should rarely occur, and this Court has made clear that the tort will not be expanded beyond those few rare atrocities. *See, e.g., Hosaflook v. Consolidation Coal Co.*, 201 W.Va. 325, 497 S.E.2d 174, 186 (1997) (termination of employee who was progressively going blind may have been "unkind," but it did not "as a matter of law support a claim for the tort of outrage"); *Johnson v. Hills Dep't Stores, Inc.*, 200 W.Va. 196, 488 S.E.2d 471, 475-476 (1997) (four-

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[31] *Tanner*, 461 S.E.2d at 157 (emphasis added).

year-old could not recover for emotional distress suffered while watching her mother's rude interrogation by store personnel concerning suspected shoplifting – "rudeness is not in itself sufficient to meet the elements of outrage"); *Hines v. Hills Dep't Stores, Inc.*, 193 W.Va. 91, 454 S.E.2d 385 (1994) (store did not commit tort of outrage by bringing misdemeanor charges against employees who took advantage of computer error to buy goods at far below the intended price); *Dzinglski v. Weirton Steel Corp.*, 191 W.Va. 278, 445 S.E.2d 219 (1994) (management employee was subjected to thorough investigation of alleged improprieties, and later discharged; investigation could not "conceivably" constitute outrageous conduct); *Keyes*, 392 S.E.2d at 695-697 (family's bickering over a funeral, obituary, and estate, even though "deliberate, hateful-minded, [and] pretty mean conduct," was not "utterly intolerable in a civilized community" and hence was not actionable); *Wayne County Bank v. Hodges*, 175 W.Va. 723, 338 S.E.2d 202, 205 (1985) (bank did not commit tort of outrage by using an affidavit containing incorrect information to obtain an attachment on funds on deposit in another bank).

Perhaps most instructive of all is *Williamson v. Harden*, 214 W.Va. 77, 585 S.E.2d 369 (2003) (per curiam), in which this Court affirmed dismissal of a claim of outrage that arose from allegedly false in-court testimony by a witness in a prior case. This Court observed that "[t]he court system simply could not function if it permitted a losing party to sue an adverse witness for the tort of outrage simply because the losing party feels the witness testified falsely or inaccurately." 585 S.E.2d

at 374. The Hospital respectfully submits that making claims of privilege for certain documents – even if they were incorrect or baseless (and the Hospital's were not) – cannot possibly be more "outrageous" than giving false testimony. The courts have ample tools to deal with such things, but the tort of outrage simply is not one of them.

In short, Plaintiff did not prove – and could not have proved – that the Hospital engaged in conduct so utterly uncivilized and "outside the bounds of decency" as to permit recovery for the tort of outrage. Although that shortcoming standing alone is enough to defeat the claim, the Hospital submits that none of the other elements of the claim were present here either. In particular, the Hospital must point out that there was no evidence that it had any *intent* to cause Mr. Boggs severe emotional distress, or that it recklessly disregarded the certainty of causing such distress. Although there can be no doubt that his wife's death grieved him, that grief is accounted for in the wrongful death verdict.[32] There is also simply no evidence of unendurably severe emotional distress caused by the alleged misconduct Plaintiff cites in support of his claim of outrage.

Camden-Clark's operation of a community hospital makes the Parkersburg area a better place, and not a less civilized one. Even if a reasonable jury might find that its conduct in this case was not above reproach, there is no evidence

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[32] That grief is also clearly subject to the MPLA's cap on damages for noneconomic loss.

that could justify a verdict against it for the truly extraordinary tort of outrage. The question should not have been submitted to the jury in the first place, and the verdict and award of damages must be set aside.

vii. Errors in Instructions and the Verdict Form Require Reversal

For the reasons stated and described *supra* at 20-25, the Hospital respectfully submits that the instructions misstated the grounds upon which it could be legally responsible for the conduct of Dr. Koyawala or CRNA Melvin, and that the verdict form's submission of the question of punitive damages against non-parties was both error in its own right and led to the error next discussed.

C. Errors Concerning Damages

i. The Circuit Court Failed to Grant the Hospital the Full Benefit of aPrior Settlement Made by Plaintiff with Dr. Koyawala and United Anesthesia

This Court has a "traditional practice of granting a nonsettling defendant a *pro tanto*, or dollar for dollar, credit for partial settlements against any verdict ultimately rendered for the plaintiff." *Bd. of Educ. of McDowell Co. v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990). This practice "furthers the strong public policy against the plaintiff recovering more than one complete satisfaction." *Id.* The Circuit Court did not

follow this Court's traditional practice, and in so doing it erred.

The genesis of the error lay in the verdict form. Although, by the time of trial, Plaintiff had settled his claims against Dr. Koyawala, and notwithstanding that Evelyn Melvin had never been a defendant in the first place, the verdict form submitted the question of punitive damages against them: "Do you find that the negligence of Dr. Koyawala or Evelyn Melvin was so excessive, reckless or aggravated that punitive damages should be awarded?" The jury answered in the affirmative and, in the next question on the form, the jury "award[ed]" $1.5 million in such damages "against Dr. Koyawala or Evelyn Melvin."

But of course the jury had no power to award anything against a dismissed party, much less a non-party. Neither Koyawala nor Melvin can be made to pay the "award."[33] Nonetheless, this phantom liability wound up making a very big difference in the judgment, because the Circuit Court used it to *reduce* the credit to which the Hospital was entitled for the partial settlement. Held the Court: "That award arises out of the conduct of Dr. Koyawala or Evelyn Melvin and is,

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[33] Just who would be liable for it if Koyawala and Melvin were parties is unclear, inasmuch as the "award" is stated in the disjunctive and improperly combines the separate questions of the individual punishment appropriate to a given defendant. *See Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114, 119 (1996) (holding that a punitive damages award is an individual liability based on the defendant's own misconduct).

thus, appropriately offset by $1,500,000.00 of the $2,000,000.00 credit from the settlement proceeds previously paid on behalf of Dr. Koyawala and United Anesthesia, Inc." Journal Order and Judgment Entry at 9. By denying the Hospital its full credit, the Court in effect required the Hospital to pay the so-called $1.5 million "award," notwithstanding that, as the Court noted, it arose "out of the conduct of Dr. Koyawala or Evelyn Melvin[,]" and notwithstanding that, in a separate finding, the jury had already awarded the prodigious sum of $3 million in punitive damages against the Hospital.

To reiterate: Koyawala settled the claims against him before trial. Melvin was not a defendant at all. The Hospital was the only defendant at trial, and this Court's longstanding law entitled it to a full setoff against all of the compensatory damages awarded against it. *See* syl. pt. 1, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996). Thus, the Circuit Court erred in setting off a pretrial settlement against a fictional "verdict" against non-parties. Any such "settlement is to be credited against any *judgment* rendered against other joint tortfeasors." *Charles v. State Farm Mut. Auto. Ins. Co.*, 192 W.Va. 293, 452 S.E.2d 384, 390 (1994) (emphasis added). There was not, and could not have been, any *judgment* rendered against Koyawala or Melvin. Only the Hospital faces a judgment; only the Hospital is entitled to the benefit of the setoff – all of it.

ii. All Non-Economic Damages Recovered by Plaintiff are Subject to the Limits Prescribed by the Medical Professional Liability Act

On July 1, 2003, important amendments to the Medical Professional Liability Act ("MPLA") went into effect. One that was of particular importance here transformed a statutory cap on "damages for noneconomic loss," previously $1,000,000, into a cap on "compensatory damages for noneconomic loss" set at $250,000 for most actions, but at $500,000 as to liability for wrongful death or certain other serious permanent injuries. W.Va. Code § 55-7B-8.

This case was filed on June 29, 2003, two days before the change in the law, and it was initially dismissed by the Circuit Court because of Plaintiff's failure to comply with the pre-suit notice requirements of the MPLA. Plaintiff promptly refiled a virtually identical action, while simultaneously appealing the dismissal. On appeal, this Court recognized that the only practical effect of its decision would be which version of the statute applied. *Boggs v. Camden-Clark Memorial Hospital Corp.*, 216 W.Va. 656, 609 S.E.2d 917, 920 (2004). The Court held that Plaintiff should have been permitted to amend his complaint, and "the changes made to the MPLA as of July 1, 2003, do not apply to appellant's case." *Id.* at 923.

Then, in what the Court itself recognized were *dicta*,[34] it criticized the Circuit Court's holding that all of Plaintiff's claims were subject to the MPLA. The Court fashioned a syllabus point on the subject,[35] and stated in the text of its opinion that intentional torts were *per se* outside of the MPLA's purview. *Id.* at 924.

Within a year, however, the Court retreated from these *dicta*. *Gray v. Mena* presented a case in which the plaintiff-patient alleged that she had been sexually assaulted during an examination performed by the defendant doctor. She contended that she need not comply with the MPLA because her claim as pled was an intentional tort. This Court held that, although her legal position could be taken in good faith, the defendant was entitled to require her to comply with the MPLA, and it ordered the Circuit Court on remand to require such compliance. *Gray v. Mena*, 218 W.Va. 564, 625 S.E.2d 326, 332 (2005). In so doing, the Court

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[34] "[O]ur reversal of the lower court's dismissal makes consideration of the appellant's other arguments unnecessary[.]" 609 S.E.2d at 923.

[35] The West Virginia Medical Professional Liability Act, codified at W.Va. Code § 55-7B-1 *et seq.*, applies only to claims resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability.

Syl. pt. 3, *Boggs*.

clarified *Boggs* by acknowledging that the MPLA *does not* exclude intentional torts from its purview.

> This Court's opinion in *Boggs v. Camden-Clark Memorial Hospital Corp.*, 216 W.Va. 656, 609 S.E.2d 917 (2004), is clarified by recognizing that the West Virginia Legislature's definition of medical professional liability, found in West Virginia Code § 55-7B-2(i) (Supp. 2005), includes liability for damages resulting from the death or injury of a person for *any* tort based upon health care services rendered or which should have been rendered. To the extent that *Boggs* suggested otherwise, it is modified.

Syl. pt. 4, *Gray*.

Given the modification to the Court's opinion, the Hospital respectfully submits that all of the non-economic damages awarded against it are subject to the statutory cap.[36] Certainly if some

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[36] This position extends to the award of punitive damages against the Hospital. In so arguing, the Hospital first acknowledges and concedes that "noneconomic loss" would not ordinarily refer to punitive damages, because punitive damages are awarded not on account of the plaintiff's loss, but because of the egregiousness of the defendant's conduct. *Burgess*, 469 S.E.2d at 119.

Here, however, the Court is construing a statute, and so the intent of the Legislature is the guiding star. A strong indicator of that intent is in the 2003 amendments to the MPLA. After those amendments, the statutory cap now applies

alleged *sexual assaults* can fall within the statute's definition of "medical professional liability," then so must even the worst misconduct alleged by Plaintiff here.

Moreover, the duties Plaintiff contended he was owed all arose from the provision of health care services to Mrs. Boggs. If the Hospital had a duty to speak (it did not) that could give rise to a claim for fraudulent concealment, that duty could only have arisen from Mrs. Boggs' hospitalization and surgery. If the Hospital behaved in an atrocious and uncivilized manner (it did not), its actions nonetheless involved core health care functions such as peer review and maintenance of medical records.

All of the non-economic damages awarded to Plaintiff were subject to the statutory cap stated in W.Va. Code § 55-7B-8 (2002), and the Circuit Court erred in holding otherwise.

iii. The Hospital Cannot be Vicariously Liable for Punitive Damages Awarded Against a Mere Ostensible Agent

The Circuit Court attempted to justify its denial of a full set-off of the co-defendant

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to "*compensatory* damages for noneconomic loss." W.Va. Code § 55-7B-8 (emphasis added). The prior version applied only to "damages for noneconomic loss," without the limiting adjective "compensatory." Former W.Va. Code § 55-7B-8 (2002). If this change is to mean anything – and this Court ought not presume that the Legislature has performed a vain act – then the version of the MPLA applicable to this case punitive damages as well.

settlement on the ground that the Hospital should be liable vicariously for the punitive damages "awarded" against Koyawala or Melvin. Post-trial Order at 38-41. This contention has at least two glaring flaws.

First, even *if* the anesthesia team had been the Hospital's actual agents, liability for punitive damages for an agent's acts does not flow automatically and vicariously to a principal. This law requires more:

> [An employer] cannot be made responsible for exemplary damages on account of injuries done by one of its servants, even though the act was wanton and malicious, unless the act was expressly or impliedly authorized or ratified by the company.

Syl. pt. 4, *Ricketts v. Chesapeake & Ohio Ry. Co.* 33 W.Va. 433, 10 S.E. 801 (1890); *see Jarvis v. Modern Woodmen of America*, 185 W.Va. 305, 406 S.E.2d 736, 743 (1991) (applying *Ricketts*). This Court's view is in the mainstream. "The common law has long recognized that agency principles limit vicarious liability for punitive damages. This is a principle, moreover, that [the United States Supreme] Court historically has endorsed." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 541 (1999) (citations omitted).

Because the Circuit Court rejected the Hospital's proffered instruction (*see supra* at 20-25 & n.17), the jury in this case *was not even asked* to

make the findings necessary to satisfy the *Ricketts* test.[37] Hence, there could not be vicarious liability for punitive damages here even if the relationship between the Hospital and the anesthesia team were sufficient to permit it, and that relationship was most *in*sufficient.

Why? Because the *Ricketts* rule itself presupposes an *actual* agency – a status the jury specifically found *did not exist* here. Apparent agents may render their apparent principals liable for compensatory damages,[38] but to *punish* someone for the acts of someone he has not actually authorized to act is something the law does not countenance.

The law of apparent agency is a reliance-based concept designed to protect the reasonable expectations of the plaintiff. *See, e.g.*, syl. pt. 7, *Burless v. West Virginia Univ. Hosps., Inc.*, 215 W.Va. 765, 601 S.E.2d 85 (2004). But the purpose of punishment is far different. "[A] positive element of

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[37] The Circuit Court's own post-trial finding of ratification (Post-trial Order at 11-12 ¶¶ 38-41) cannot cure this deficiency. Moreover, the Court based its ruling, at least in part, on the Hospital's contesting Koyawala and Melvin's negligence at trial. *Id.* at 11 ¶ 40. Hence, the Hospital was yet again faulted and punished merely for defending itself, and post-complaint occurrences were yet again used improperly against it. *See Harless*, 289 S.E.2d at 696 n.6.

[38] Effective with the 2003 amendments to W.Va. Code § 55-7B-9(g), however, the Legislature effectively abolished altogether vicarious liability under an apparent authority theory in cases subject to the MPLA.

conscious wrongdoing is always required" in order to justify punitive damages, and it is "improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously." *Kolstad*, 527 U.S. at 538, 543 (quotations omitted). Moreover, because there is no substantive right to an award of punitive damages,[39] the plaintiff cannot be said to have acquired any reasonable expectation of them from the mere appearance of (an actually nonexistent) agency.

Accordingly, the United States Supreme Court was standing on well-established ground when it "rejected the theory that an employer is vicariously liable for punitive damages based solely on the employee's apparent authority[.]" *United States v. S. Maryland Home Health Servs., Inc.*, 95 F.Supp.2d 465, 470 (D.Md. 2000) (citing *Kolstad*). This Court should reject it as well.

Even if the actions of Dr. Koyawala, CRNA Melvin, or both, merited punishment, the record is clear – and the jury found – that they did not have the actual authority to so act on the Hospital's behalf. Hence, the Hospital could not be liable vicariously for punitive damages even had the jury been instructed on that question.

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[39] *Pendleton v. Norfolk & W. Ry. Co.*, 82 W.Va. 270, 95 S.E. 941, 944 (1918) ("The jury is at perfect liberty, no matter how wanton or reckless the defendant has been, to refuse punitive damages [.]")

iv. Punitive Damages are Duplicative of Plaintiff's (Already Duplicative) Compensatory Damages

As the Hospital has shown, Plaintiff was awarded emotional distress damages twice for the same alleged wrong, merely because he gave his cause of action two different labels. The hefty award of punitive damages against the Hospital replicated these damages yet a third time.

This Court has long recognized the "openendedness" of damages for emotional distress, and that large awards of such damages may overlap with and improperly duplicate punitive damages. *See* syl. pt. 5, *Harless v. First Nat'l Bank*, 169 W.Va. 673, 289 S.E.2d 692 (1982); syl. pt. 8, *Dzinglski v. Weirton Steel Corp.*, 191 W.Va. 278, 445 S.E.2d 219 (1994) ("In permitting recovery for emotional distress without proof of physical trauma when the distress arises out of the extreme and outrageous conduct intentionally caused by the defendant, damages awarded for the tort of outrageous conduct are essentially punitive damages. Therefore, in many cases emotional distress damages serve the policy of deterrence that also underlies punitive damages."); *see also State Farm*, 538 U.S. at 426 (observing that compensatory damages for emotional distress "already contain [a] punitive element").

The overlap has a long pedigree. "Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of

compensatory damages prevalent at the time." *Cooper Industries*, 532 U.S. at 437 n.11.

For these reasons, as regards the tort of outrage, this Court *presumes* that compensatory and punitive damages are duplicative unless the plaintiff comes forth with proof of a "*serious* physical or mental condition requiring medical treatment, psychiatric treatment, counseling or the like[.]" Syl. pt. 14, *Tudor v. Charleston Area Medical Center, Inc.*, 203 W.Va. 111, 506 S.E.2d 554 (1997) (emphasis added).

Boggs testified that he had had difficulty sleeping after his wife's death, particularly for the first six months, and that he began taking prescription "nerve pills" to induce sleep. Tr. Vol. I (March 3, 2006) at 580-81. He also saw his doctor three or four times about his feelings of depression. He was prescribed anti-depressant medication, but stopped taking it after about "a month." Tr. Vol. I (March 3, 2006) at 580-81.

It is important here to reiterate that Plaintiff's damages for intentional infliction of emotional distress must relate to distress that is *independent* of the understandable grief cause by his wife's death. That grief is subsumed in his claims of medical negligence, and his recoverable damages therefore are precisely those that are limited by the MPLA. Instead, only that degree of emotional distress attributable to the alleged outrage and fraudulent concealment can be taken into account when applying *Tudor*'s central principle:

In cases where the jury is presented with an intentional infliction of emotional distress claim, without physical trauma or without concomitant medical or psychiatric proof of emotional or mental trauma, i.e. the plaintiff fails to exhibit either a serious physical or mental condition requiring medical treatment, psychiatric treatment, counseling or the like, any damages awarded by the jury for intentional infliction of emotional distress under these circumstances necessarily encompass punitive damages and, therefore, an additional award for punitive damages would constitute an impermissible double recovery. Where, however, the jury is presented with substantial and concrete evidence of a plaintiff's serious physical, emotional or psychiatric injury arising out of the intentional infliction of emotional distress, i.e. treatment for physical problems, depression, anxiety, or other emotional or mental problems, then any compensatory or special damages awarded would be in the nature of compensation to the injured plaintiff(s) for actual injury, rather than serving the function of punishing the defendant(s) and deterring such future conduct, a punitive damage award in such cases would not constitute an impermissible double recovery. To the extent that this

> holding conflicts with our decision in *Dzinglski v. Weirton Steel Corp.*, 191 W.Va. 278, 445 S.E.2d 219 (1994), it is hereby modified.

Syl. pt. 14, *Tudor*.

The Court elaborated on this syllabus point in the text of its opinion:

> [I]n order to collect damages for intentional infliction of emotional distress, as well as punitive damages in the same action, the jury must be presented with some *quantifiable measure* of compensatory damages sustained from the intentional infliction of emotional distress so that *it is clear* that those damages are not duplicative punitive damages.

506 S.E.2d at 575 (emphasis added).

Whatever else may be said as regards Mr. Boggs' evidence of emotional distress, it most certainly provides no "quantifiable" basis for a $375,000 award. It obviously provides even less of a basis for the additional $100,000 awarded for the same injury under his fraudulent concealment theory. Even in the twenty-first century, $475,000 remains a lot of money – it certainly could buy many orders of magnitude more treatment than Mr. Boggs sought.

Moreover, even if *all* of Mr. Boggs' emotional distress awards are not punitive damages in disguise – and perhaps they are not – the Circuit Court was still required to examine those awards carefully to assure against double (or triple) recovery:

> Where a jury verdict encompasses damages for intentional infliction of emotional distress, absent physical trauma, as well as for punitive damages, *it is incumbent upon the circuit court to review such jury verdicts closely* and to determine whether all *or a portion* of the damages awarded by the jury for intentional infliction of emotional distress are duplicative of punitive damages such that some or all of an additional award for punitive damages would constitute an impermissible double recovery. If the circuit court determines that an impermissible double recovery has been awarded, it shall be *the court's responsibility* to correct the verdict.

Syl. pt. 15, *Tudor* (emphasis added). The Circuit Court ruled that it need not perform this "incumbent ... responsibility." Post-trial Order at 13 ¶¶ 44-45. True to its word, it offered only a cursory conclusion that "the jury intended" the compensatory award to be compensatory. *Id.* at 13-14 ¶ 46. *Tudor* requires that the Circuit Court review the verdict *closely*, not perfunctorily. Had it done so, it could only have concluded that at least a substantial portion of Mr.

Boggs' awards of compensatory and punitive damages were duplicative (or indeed triplicative).

v. There was an Insufficient Factual Predicate for an Award of Punitive Damages

Punitive damages may not be awarded in West Virginia unless the defendant's misconduct transgresses a very high threshold of blameworthiness. This threshold was established by this Court over a century ago and has remained unchanged ever since:

> In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.

Syl. pt. 4, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895); *see also* syl. pts. 4 and 7, *Alkire v. First Nat'l Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996) (quoting *Mayer* and establishing "two-step paradigm" in which its conduct test is the first).

The Hospital respectfully submits that its actions as regards Mrs. Boggs' surgery and its aftermath do not approach, much less transgress, the *Mayer v. Frobe* threshold. Hence, the question of punitive damages should not have been submitted to

the jury, and the erroneous award of punitive damages should have been set aside.

vi. The Circuit Court's Failure to Properly Review the Punitive Damages Award Deprived the Hospital of Procedural Due Process

"Punitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co.*, 512 U.S. at 432. For this reason, punitive damages warrant special procedural protections. The safeguards required by this Court were announced in *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).[40] They have three elements – jury instructions, review by the trial court, and appellate review by this Court.

The necessary instructions were described in Syllabus Point 3 of *Garnes*:

> When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:
>
> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the

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[40] These procedures are modeled over those approved by the United States Supreme Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

(2) The jury should consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

> (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.
>
> (5) The financial position of the defendant is relevant.

Similarly, careful judicial review of the amount of a punitive damages award is also required by the Fourteenth Amendment's Due Process Clause. *Honda Motor Co.*, 512 U.S. at 432-435. This judicial review safeguard is intended to operate as a *constraint* on punitive damages awards. *Garnes*, 413 S.E.2d at 904 (judicial review "insures that awards do not exceed an amount that will accomplish society's goals of punishment and deterrence"). Syllabus Point 4 of *Garnes* describes the minimum required judicial review:

> When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:
>
> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;
>
> (3) Any other civil actions against the same defendant based on the same conduct; and

> (4) The appropriateness of punitive damages to encourage fair and reasonable settlement when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.
>
> Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

The judgment order here was silent as to *Garnes*. In its order denying the Hospital's post-trial motions, however, the Circuit Court did finally offer a brief *Garnes* analysis, albeit one so deeply flawed that it deprived the Hospital of *Garnes*' procedural protections.

For example, in its treatment of the very first *Garnes* factor, the Circuit Court identified the wrong harm, proposing to justify the very large award *on account of Mrs. Boggs' death*. Post-trial

Order at 9, ¶ 36(1). But the award's propriety must rest only on the conduct for which the law permits punitive damages. Although the Hospital was found independently negligent on Plaintiff's wrongful death claim, only the negligence of Koyawala and Melvin was found to be "so excessive, reckless or aggravated that punitive damages should be awarded[.]" *See* Journal Order and Judgment Entry (May 3, 2006) at 7 (question 3) and 9 (question 12). Simple negligence cannot support an award of punitive damages. *Bennett v. 3 C Coal Co.*, 180 W.Va. 665, 379 S.E.2d 388, 394 (1989). Hence, the punitive damages award against the Hospital can and must rest solely on the fraudulent concealment and outrage claims and the harm or potential harm resulting therefrom.[41] It is self-evident that Mrs. Boggs' death was not such a result. Indeed, her death occurred before the conduct of which Plaintiff complains.

With the first *Garnes* factor properly framed, the result must be much different than the Circuit Court posited. The Hospital submits that relying on privileges to withhold documents in litigation – even if the claims of privilege prove incorrect – neither caused, nor is likely to cause, significant harm. Courts sort out such things routinely, using their power of *in camera* review, and a party who challenges a claim of privilege is not likely to suffer any ultimate harm if his challenge has merit.

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[41] As was described above, Plaintiff freely conceded as much at trial. *See supra* at 20-25 & n.15.

As for the second factor, reprehensibility, the Hospital must again simply state that it took legal positions in good faith and in its own defense, and it had no intention of causing the Boggs family any harm. The Circuit Court's observations (*id.* at ¶ 36(2)) that these positions occurred "over a period of years" and worked to "conceal" the Hospital's actions simply describe the effects of a party's – any party's – assertions of privilege in lengthy litigation, and the Court's statement that the Hospital was "aware" that it was causing or would like cause harm to Plaintiff lacks support in the record.

The Hospital obviously did not profit from its conduct, as the Circuit Court correctly observed. *Id.* at 9-10 ¶ 36(3). But the Court then immediately turned the third factor on its head – it held that "[a]s a result, this factor bears no relationship to the analysis of the appropriateness of the punitive damages award." *Id.* The Court was wrong. Of course the factor "bears [a] relationship" to the analysis; it just does not counsel in favor of a large award of punitive damages. By giving the factor no weight, the Court deprived the Hospital of its appropriate mitigating effects.

The Circuit Court's misapplication of the fourth factor replicates its misapplication of the first. Again the Court included the wrongful death judgment in its calculations, concluding that the ratio of punitive to compensatory damages was a "reasonable" 2.2:1. *Id.* at 10 ¶ 36(4). In doing so, of course, the Circuit Court was once more attempting to justify punishment based upon conduct – simple

negligence – for which punishment may never be imposed.

Thus, the punitive damages award of $3,000,000 clearly does not bear a reasonable relationship to compensatory damages. The compensatory award for fraudulent concealment and outrage is $475,000, and, as was discussed at length above, most or all of it already constitutes punitive damages under the *Tudor* rule. We do not (and perhaps cannot) know the actual size of the compensatory component, but it seems likely that the ratio of punitive to compensatory damages here is well into double digits. Even if *all* of the compensatory award were truly that, the ratio would still be 6.3 to 1. Such an award would be constitutionally excessive given the lack of any evidence that the Hospital acted with evil intention in order to cause harm. *See* syl. pt. 15, *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992).

Finally, and even though no evidence of the Hospital's financial condition was in evidence, the Circuit Court found it to be a "significant institution" that had represented that it the ability to "bear the cost of the damages awarded by the jury." *Id.* at 10 ¶ 36(5). This rationale for imposing severe punishment is not only inappropriate, but also unconstitutional. The United States Supreme Court has held flatly that "[t]he wealth of a defendant *cannot* justify an otherwise unconstitutional punitive damages award." *State Farm*, 538 U.S. at 427 (emphasis added). Because this award would be excessive for any defendant, it

cannot be rendered constitutional just because the Hospital may have the means to pay it.[42]

The supplemental factors stated in *Garnes*' syllabus point 4 have little bearing here. Medical malpractice litigation is by its nature costlier than many other types. There have not, of course, been any criminal sanctions imposed on the Hospital, and the other civil actions against it arising from these facts have all been filed by the Plaintiff. Finally, the Hospital denies that its privilege claims inflicted a "clear wrong" for which the prospect of punitive damages should serve as an impetus for settlement.

In sum, the Hospital submits that a proper *Garnes* analysis can lead to only one result: the punitive damages award is grossly excessive and should be reversed.

vii. The Punitive Damages Award Violated the Hospital's Substantive Due Process Rights

Due process imposes a substantive limit on the State of West Virginia's power to punish.

> Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process

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[42] The Hospital respectfully submits that, in light of *State Farm*'s clear holding, this Court should strike the fifth *Garnes* factor, or else modify it to specify that while poverty might justify an award *below* the constitutional maximum, wealth can never justify an award *above* it.

> Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. The Due Process Clause of its own force also prohibits the States from imposing "grossly excessive" punishments on tortfeasors[.]

Cooper Industries, 532 U.S. at 433-434 (citations omitted).

A fundamental restraint on the power to punish is fair advance notice of the potential punishment:

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of *the severity of the penalty* that a State may impose.

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996) ("*Gore*") (emphasis added).

This holding – however "elementary" its footing – was a groundbreaking one. *Gore* "is the first case in modern times in which the Supreme Court has found a punitive damages award to be so excessive that it violates the *substantive* component

of the Due Process Clause." *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 636 (10th Cir. 1996) (emphasis added). Until that time, the Court's efforts to rein in punitive damages had involved only *procedural* safeguards, and most courts had assumed that a punitive damages award made at a fair trial and subjected to proper review was unassailable. *See BMW of North America, Inc. v. Gore*, 701 So.2d 507, 510 (Ala. 1997) (on remand). In other words, a defendant is entitled not only to a fair *procedure* (*à la Garnes*), but also a fair substantive *result*.[43]

The *Gore* Court established three "guideposts" for substantive due process review of punitive damages awards: the degree of reprehensibility of the conduct; the disparity between the award and the harm or potential harm suffered; and the difference between the award and the civil penalties authorized or imposed in similar cases. 517 U.S. at 575.

Although the Hospital believes for the reasons already stated that its claims of privilege were well-taken, the worst that can be said of them is that they were mistaken. Such mistakes are not "reprehensible" in the sense that they call for an immense award of punitive damages. *Vandevander v. Sheetz, Inc.*, 200 W.Va. 591, 490 S.E.2d 678, 691

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[43] An apt analogy to this distinction is a criminal trial, in which the defendant is entitled to various procedural protections and safeguards. But those procedures are not his only due process guarantees. In addition, when the trial ends with a guilty verdict, he is also entitled to a punishment within the *substantive* limits prescribed by preexisting law.

(1997) ("bad or legally incorrect corporate policy is not the equivalent of a mean-spirited, evil intent to cause harm"). There was also no evidence that similar conduct by the Hospital had ever been held to be unlawful before. *See Gore*, 517 U.S. at 579 (deeming it "significant" on the question of reprehensibility that there was no evidence that the defendant "persisted in a course of conduct after it had been adjudged unlawful on even one occasion").

The second guidepost is the harm or potential harm suffered. Again, it seems unlikely that assertions of privilege could cause significant, let alone grievous, harm, especially to someone who is represented by counsel when those assertions are made.

Finally, under the third guidepost, there is a drastic difference between the punishment imposed on Camden-Clark in this case and a typical statutory civil penalty. Plaintiff's most scandalous (albeit untrue) allegation against the Hospital was that it destroyed, tampered with, or altered medical records. West Virginia does not appear to have a specific statute addressing such misconduct, but a sampling of other states' laws reveals financial penalties in the range of $500 to $1,000.[44] The

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[44] *See, e.g.*, Fla. Stat. Ann. §§ 395.302, 775.083 (2006) (punishing fraudulent alteration or falsification of a medical record as a misdemeanor subject to a fine of up to $500); Ga. Code Ann. §§ 16-10-94.1, 17-10-3 (2006) (punishing alteration or falsification of a medical record "with intent to conceal any material fact relating to a potential claim or cause of action" as a misdemeanor subject to a fine of up to $1,000); Mich. Comp. Laws § 750.492(a) (2006) (punishing intentional destruction of medical records as a felony, and reckless inclusion of

punitive damages award against the Hospital is three thousand times greater than even the higher figure.

In light of the *Gore* guideposts, the Hospital submits that it is clear that no one could have had fair notice that the conduct complained of might subject a civil defendant to a punishment of $3 million. Accordingly, the award in this case violates the Hospital's substantive due process rights.

V. CONCLUSION

The record shows that Mrs. Hilda Boggs was a respected and valuable contributor to her community. It also discloses that her family and friends grieved her passing deeply and sincerely. Reduced to its barest essentials, the mission of the Hospital is to improve life and forestall death, and so it can only regret the result of that attempted surgery on the evening of September 29, 2001.

The record is clear in other ways as well. Privileged documents were improperly disclosed, rendering the entire verdict unreliable and infirm. Ordinary post-complaint privilege assertions were substituted for the scheme of fraudulent concealment alleged in the complaint. The same damages were recovered more than once. An illusory award against non-parties increased the Hospital's liability by $1.5 million. With the

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misleading or inaccurate information in a medical record as a misdemeanor subject to a $1,000 fine); Miss. Code Ann. § 41-10-1 (2006) (punishing falsification or destruction of a medical chart as a misdemeanor subject to a fine of up to $1,000).

scantest of evidence of quantifiable harm caused by its alleged intentional misdeeds, the Hospital has been assessed $3 million in punitive damages. The Hospital respectfully submits that it too is a valuable contributor to its community, and that the record demonstrates nothing that could justify the degree of punishment it faces.

There can be no doubt that the Circuit Court's errors were substantial, harmful, and reversible. Plaintiff's counsel made an apt remark at the February 24, 2006, hearing, describing the effect that having the privileged documents had made on his case. Said counsel, "it makes a huge difference, the material that's in there, in issues to this case. I mean, I shudder to think the trial that would have taken place if we'd never gotten it." Tr. (Feb. 24, 2006) at 101. The Hospital does not "shudder" at the thought of such a trial – it would have been a fair one. The Hospital remains entitled to that trial.

This petition, along with that already docketed as No. 063408, should be granted, and, upon a consolidated appeal, the judgment below should be reversed and the case remanded to the Circuit Court of Wood County for a new trial.

Respectfully submitted,

Camden-Clark Memorial Hospital Corp.,

By counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Nos. 063408 & 070578

BERNARD BOGGS, as Administrator of the Estate of HILDA BOGGS, deceased, as Personal Representative of the statutory beneficiaries of the wrongful death claim herein asserted and in his own right,

Plaintiff below,

Respondent,

v.

CAMDEN-CLARK MEMORIAL HOSPITAL CORPORATION,

Defendant below,

Petitioner.

CAMDEN-CLARK MEMORIAL HOSPITAL'S MOTION FOR LEAVE TO RENEW PETITIONS FOR APPEAL OUT OF TIME

Pursuant to W.Va. R. App. P. 2, 6, and 7(b), Camden-Clark Memorial Hospital Corporation (the "Hospital") respectfully moves for leave of this Court to renew two petitions for appeal that it previously filed in this Court, which petitions were docketed as Nos. 063408 and 070578 (the "Petitions"). As the

Hospital will show below, its motion should be granted.

Background

On September 20, 2007, this Court denied the Petitions, which sought review of a nearly $5 million judgment entered against the Hospital in the Circuit Court of Wood County. *See Boggs v. Camden-Clark Memorial Hospital Corp.*, Nos. 063408 & 070578 (W.Va. Sup.Ct.App. Sep. 20, 2007). Pursuant to W.Va. R. App. P. 7(b), the Hospital now seeks to renew those petitions to this Court. Because the time to do so as of right has run, the Hospital respectfully requests leave to renew its petitions out of time. This Court has the power to grant such leave pursuant to its broad authority under W.Va. R. App. P. 2.

The Hospital is confident that the Petitions had - and have - considerable merit. A few of those meritorious points are briefly noted below, but the Hospital understands that an extensive reargument of the Petitions is not in order here. Instead, as Rule 2 directs, the Hospital will demonstrate that there is "good cause" to permit the Petitions' out-of-time renewal, and that such renewal will "allow [this] Court to do substantial justice."

There is Good Cause to Permit Renewal

First, the Hospital should place the Petitions in their larger procedural context, a context that changed after the Petitions were drafted and submitted to this Court.

Subsequent to the filing of both of the Petitions - indeed, subsequent to this Court's placement of them on the motion docket - the Circuit Court entered yet another order, imposing yet another seven-figure punishment on the Hospital. On May 24, 2007, as a sanction for alleged misconduct, the Circuit Court ordered the Hospital to pay Plaintiff an additional $1,359,241.02, plus postjudgment interest. With this order, the total principal amount awarded against the Hospital now stands at approximately $6.2 million.

The Hospital timely filed a third petition for appeal with the Clerk of the Circuit Court on September 19, 2007 (the "Sanctions Petition"). This petition should be transmitted to this Court shortly. At any rate, for the Court's reference, a courtesy copy is attached as Exhibit A to this motion.

Any review of this recent filing will show that the issues to be raised upon the Sanctions Petition are tightly intertwined with those urged in the petitions that the Hospital now seeks to renew. Many of the allegations for which the Hospital is sanctioned were also raised (and repeatedly accentuated) by Plaintiff at trial in support of his claims for fraudulent concealment, outrage, and punitive damages. Indeed, one of the Hospital's strongest grounds for an appeal upon the Sanctions Petition is that the sanction is redundant of the verdicts on those claims (which were in turn redundant of one another).

The Sanctions Petition also gives the Hospital an opportunity to explain, and in a number

of instances, conclusively refute, certain counsel-drafted "findings" contained in the May 24 order. Such a rebuttal would have been difficult to construct for the Petitions, not only on account of space limitations, but because the jury's findings were relatively nonspecific. The same allegations were nonetheless in play at trial.

Finally, the May 24 sanctions order actually changes the legal landscape as regards at least two issues that were important in the Petitions. For one thing, and perhaps most obviously, it greatly increases the degree of punishment faced by the Hospital for a single course of alleged misconduct. The Hospital respectfully submits that proper constitutional review of such cumulative punishment can only be done in a unitary, and not piecemeal, fashion. For another, the sanctions order, if imposed by the Circuit Court with jurisdiction,[1] necessarily means that *no prior final judgment* had theretofore been entered. *See Bartles* v. *Hinkle,* 196 W.Va. 381, 472 S.E.2d 827 (1996). The Hospital cannot know on what ground or grounds the Justices who voted to deny the Petitions relied (or even whether each shared the reasons of one or both others), but to the extent that any may have been concerned by the alleged untimeliness of the Hospital's post-trial motions, the order that is the subject of the third petition could seriously undermine that concern.

In sum, there are good reasons - apart from the Hospital's conviction that they demonstrated

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[1] As the Hospital's third petition argues, the Circuit Court in fact acted without jurisdiction. Third Petition at 32-34.

serious reversible error - why the Hospital should be permitted to renew the Petitions, and such renewal will enable the Court to hear the case as a whole and achieve substantial justice.

The Petitions Have Merit

With the Court's indulgence, the Hospital feels that it must also quickly highlight some of the patent and serious errors that may go uncorrected if this Court never reviews the judgment below.

A. Erroneous Admission of Confidential Peer Review Materials

The controlling law is plain:

> The proceedings and records of a [peer] review organization shall be confidential and privileged and shall not be subject to subpoena or discovery proceedings *or be admitted as evidence in any civil action* arising out of the matters which are subject to evaluation and review by such organization.

W.Va. Code § 30-3C-3 (in relevant part; emphasis added). Despite this controlling statute, peer review documents were not only divulged to Plaintiff, but received in evidence and otherwise used at trial.

This error was not merely unwelcome to the Hospital; it is *dangerous* to the public. The primary purpose of any confidentiality rule - and most

certainly of this one - is by definition to promote and assure *confidence.* Be it a priest and penitent, lawyer and client, or husband and wife, the law values and respects the confidence that must exist in order for persons who need to speak frankly and openly to be able to do so.

Here, of course, there is no ultimate incompatibility between the social utility of medical staff peer review and of medical malpractice litigation. Both can work to assure a high level of competence and performance in our medical professionals. But their mechanisms are very different - indeed, unless the bright lines drawn around peer review by the Legislature are respected, their mechanisms are *incompatible.* Again, without confidentiality, there can be no confidence. "Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit." *Daily Gazette Co. v. West Virginia Board of Medicine*, 111 W.Va. 316, 352 S.E.2d 66, 72 n.12 (quotation omitted).

The "atmosphere of apprehension" caused by the Circuit Court's erroneous rulings is highly unlikely to be confined to the Hospital. Even though they are not embodied in a published opinion with legally binding, state-wide precedential impact, the rulings are by no means secrets. Apprehension and wariness will follow them wherever they are known, to the detriment of the peer review process and, ultimately, to the public health.

The Circuit Court's error is stark and stands uncorrected.

B. Lack of Full Offset of Pretrial Settlement

The controlling law is plain: any pretrial "settlement is to be credited against *any judgment* rendered against other joint tortfeasors." *Charles v. State Farm Mutual Auto. Ins. Co.*, 192 W.Va. 293, 452 S.E.2d 384, 390 (emphasis added). The amount of the required credit is so well established that this Court has described it as "traditional" - *"pro tanto,* or *dollar for dollar,* credit for partial settlements against any verdict ultimately rendered for the plaintiff." *Board of Education of McDowell Co.* v, *Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990).

A pretrial settlement put two million dollars in the hands of Plaintiff and his attorneys, yet the Hospital was given credit for only a quarter of that total. The Circuit Court's error is stark and stands uncorrected.

C. Necessity of "Exacting" and *De Novo* Review of Punitive Damages

The controlling law is plain: appellate review of an award of punitive damages is an essential component of the defendant's procedural due process rights under the Fourteenth Amendment. *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 n.9 (2001) (noting that the Supreme Court has *"emphasized* the importance of appellate review to ensuring that a

jury's award of punitive damages comports with due process") (emphasis added). Two years after *Cooper Industries,* the Supreme Court reprised the same theme in unmistakable terms:

> We reiterated the importance of [the *BMW* v. *Gore]* guideposts in *Cooper Industries* and *mandated* appellate courts to conduct *de novo* review of a trial court's application of them to the jury's award. Exacting appellate review ensured that an award of punitive damages' is based upon an application of law, rather than a decisionmaker's caprice.

State Farm Mutual Automobile Inc. Co, v. *Campbell,* 538 U.S. 408, 418 (2003) (emphasis added; citations and quotation omitted).

In this Court, the denial of an appeal is not an expression of the court's view on the merits. *See, e.g., Triggs* v. *Berkeley Co. Board of Education,* 188 W.Va. 435, 425 S.E.2d 111,118 n.9 (1992); syllabus, *Smith* v. *Hedrick,* 181 W.Va. 394, 382 S.E.2d 588 (1989); *In re Nat'l Bank of Wheeling,* 137 W.Va. 673, 73 S.E.2d 655, 667 (1952) (overruled in part on other grounds, *In re Kanawha Valley Bank,* 144 W.Va. 345, 109 S.E.2d 649 (1959)).[2] Indeed, the *Triggs*

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[2] The Hospital respectfully submits that even if this Court considered its denials of discretionary review to be merits determinations, *unexplained* denials would be unconstitutional, because they would lack a written opinion demonstrating "exacting" and "*de novo*" application of the *Gore* factors. Finally, the Hospital submits that both its substantive and procedural due process rights would be violated if it is, in effect, compelled to pay a phantom punitive damages "award" imposed upon a non-defendant (Melvin) "or" settling defendant (Koyawala).

Court noted that the denial of a petition for appeal does not even "carry *any implication* of approval of the judgment sought to be reviewed." 425 S.E.2d at 118 n.9 (emphasis added).

The Hospital is entitled to an exacting appellate review by this Court. The denial of the Petitions plainly falls short of the due process minimum guaranteed the Hospital by the Fourteenth Amendment. The error is stark and stands uncorrected.

Conclusion and Prayer for Relief

On a not-for-profit and charitable basis, the Hospital has served Parkersburg and surrounding communities for 110 years; its reputation has heretofore been untarnished. If the extraordinary punitive damages award stands, much, and perhaps all, of it will have to be paid from funds held and dedicated to the Hospital's charitable mission.[3] The loss of such a staggering amount of money can only diminish that pursuit. If the extraordinary, improper, and redundant economic sanction addressed in the Hospital's third petition stands,

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[3] As the Hospital noted in its Third Petition at 33 n.18, it maintains umbrella insurance coverage with St. Paul Fire & Marine Insurance Company. This coverage is, however, only excess to a self-insured retainage. More importantly, St. Paul has heretofore resisted recognizing its obligation to pay a portion of any judgment that ultimately may have to be paid to Mr. Boggs, and the Hospital and St. Paul are currently involved in litigation over that issue in the United States District Court for the Southern District of West Virginia. *See Camden-Clark Memorial Hospital Corp.* v. *St. Paul Fire and Marine Insurance Co.*, No. 6:06-1013 (S.D.W.Va.).

much, and perhaps all, of it will tap the Hospital's dedicated funds as well.

The Hospital is confident that the record below teems with serious error, and that the judgment and sanctions order are infirm. But the Hospital also respectfully submits that, even if the record prove spotless and the judgment and order unassailable, its status, mission, and longstanding community service commend its petitions to the plenary review of an appeal by this Honorable Court.

Accordingly, the Hospital respectfully prays that its motion to renew be granted, and that Petitions No. 063408 & 070578 be restored to the active docket of this Court.

Respectfully submitted,

Camden-Clark Memorial Hospital Corp.,

By counsel,

/s/

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STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th of May, 2005, the following order was made and entered:

Phillip H. Willis and Ritta H. Willis,
Plaintiffs Below, Respondents

vs.) No. 050244

James Pate and State Farm Insurance Company, Defendants Below,

James Pate, Petitioner

On a former day, to-wit, February 1, 2005, came the petitioner, James Pate, by David A. Mohler and John J. Polak, Atkinson Mohler & Polak, PLLC, his attorney, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 7th day of September, 2004, with the record accompanying the petition. Thereafter, on the 8th day of February, 2005, came the respondents, Phillip Willis and Ritta H. Willis, by Tony L. O'Dell, Berthold, Tiano & O'Dell; and Robert Warner, Warner Law Offices, PLLC, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justices Maynard and Benjamin would grant.

A True Copy

Attest: /s/
Clerk, Supreme Court of Appeals

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PHILLIP H. WILLIS and
RITTA H. WILLIS,

Plaintiffs/Appellees,

Petition No.:
(Circuit Court of Kanawha County, West Virginia
Civil Action No.: 02-C-367
Judge Jennifer Bailey Walker)

v.

JAMES PATE,

Defendant/Appellant,

and

STATE FARM INSURANCE COMPANY,

Defendant.

PETITION FOR APPEAL ON BEHALF OF JAMES PATE

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PETITION FOR APPEAL ON BEHALF OF JAMES PATE

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This appeal arises from a jury's verdict which awarded the plaintiffs both compensatory and punitive damages against defendant/appellant James Pate as a result of a vehicular accident which occurred in Dunbar, Kaaawha County, West Virginia on April 22, 2001. Mr. Pate, who admitted liability, does not appeal the compensatory damage award to plaintiffs. Mr. Pate files this petition for appeal solely with regard to the award of punitive damages rendered against him. This appeal provides this Court with an important opportunity to alleviate confusion surrounding the appropriate application of the standards related to punitive damages previously set forth by this Court in Games v. Fleming Landfill. Inc., 186 W. Va. 656, 413 S.E.2d 897 (1991) and Alkire v. First National Bank of Parsons, 197 W. Va. 122, 475 S.E.2d 122 (1996). Moreover, this appeal provides the Court with a further chance to address and clarify this state's response to and compliance with the significant due process concerns addressed by the United States Supreme Court in State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513 (2003).

Plaintiffs filed their original suit against Mr. Pate and his insurer in February 2002. By Order dated May 20, 2002, plaintiffs' Unfair Claims Settlement Practices claim against the insurer was

bifurcated and stayed until final resolution of the plaintiffs' claims against Mr. Pate, pursuant to State ex rel. State Farm Fire & Casualty Co. v. Madden, 192 W. Va. 155, 451 S.E.2d 721 (1994).

By Order dated April 14, 2003, over the objection of Mr. Pate, plaintiffs were permitted to file an Amended Complaint, alleging entitlement to punitive damages against Mr. Pate. In seeking an award of punitive damages against Mr. Pate, plaintiffs' Amended Complaint asserted:

> 14. At all times herein, Defendant James Pate knew that he had a lifetime history of seizures, which could impair his ability to drive. In fact, Defendant James Pate was aware that he had experienced a seizure, which resulted in an automobile collision, prior to his operating his vehicle on April 22, 2001 and colliding with the motorcycle, which was operated by Plaintiff Phillip Willis.
>
> 15. At all times herein, Defendant James Pate acted intentionally, willfully and maliciously in operating a vehicle with the knowledge that he could experience a seizure at any time and cause a motor vehicle collision.

Amended Complaint, ¶¶ 14-15.

The case was tried in January 2004. Over multiple objections by Mr. Pate's counsel, the circuit

court admitted substantial evidence of facts related to Mr. Pate which occurred subsequent to April 22, 2001, the date of the accident in question. The jury returned a verdict on behalf of the plaintiffs against Mr. Pate for $52,059.28 in compensatory damages and $75,000.00 in punitive damages.

Following the verdict, the circuit court conducted a post-trial review *of the* punitive damage award pursuant to Games and Alkire. By Order dated June 28, 2004, the circuit court found the punitive damage award to be proper and upheld the award. A judgment order was entered on July 26,2004. Following a hearing on Mr. Pate's Motion for Judgment as a Matter of Law or in the Alternative, Motion for New Trial Regarding Punitive Damages Only, the circuit court entered an Order dated September 7, 2004 which denied the Appellant's motions.

It is from this Order that Mr. Pate appeals.

II. STATEMENT OF FACTS

As noted above, this lawsuit arises out of a motor vehicle/motorcycle accident occurring on Fairlawn Avenue in Dunbar, West Virginia on April 22, 2001, at which time James R. Pate, operating a S-10 pick-up, rear-ended a motorcycle operated by Phillip Willis, a 66 year-old resident of Dunbar. Mr. Willis claimed that he suffered a closed head injury as a result of the accident.

Mr. Pate was born on May 22,1962, and was 41 years old at the time of trial. Mr. Pate had

suffered from seizures from the time of his birth through age 15. He was then seizure free for approximately 15 years. He began having seizures again at the age of 30 in 1992. He was treated by Dr. Poffenbarger until that doctor's retirement in 1995. Nowhere in Dr. Poffenbarger's records was there any written indication that Mr. Pate was warned not to drive. Dr. Kuruvilla John began treating Mr. Pate in 1996, and treated him through May, 2001. (Trial Tr. at 79.)

Mr. Pate, who was called by the plaintiffs adversely as the first witness at the trial of this matter, admitted that lie may have suffered a seizure sometime in 1996 while driving, at which time his stepson had to take the wheel. (Trial Tr. at 82.) Dr. John testified that, when Mr. Pate first came to his office, Mr. Pate told him of the incident a couple of years before where his stepson had to take the wheel. (Trial Tr. at 155.) Dr. John testified at trial that it was his general practice to warn patients with seizure disorders not to drive for a period of one year after any seizure related activity. (Trial Tr. at 153.) However, Dr. John also testified that he would not reiterate his warnings' and would only tell his patients this during their first visit. (Trial Tr. at 154.)

No evidence was introduced that Mr. Pate suffered any other seizure-related activity through March of 2000. Mr. Pate testified that on March 15, 2000, he suffered a seizure at home (not while driving) which was apparently related to stress from the death of his mother. (Trial Tr. at 97.) However, approximately six months later on September 29,

2000, Mr. Pate was involved in an automobile accident which was apparently related to a seizure or "blackout" spell. Mr. Pate advised Dr. John of this blackout spell which was reflected in Dr. John's office notes of October 3, 2000. (Trial Tr. at 150, 191-192.) There is nothing in Dr. John's notes (or his trial testimony) wherein the doctor specifically indicated that he warned Mr. Pate not to drive thereafter.

Mr. Pate did not suffer from any other seizure related activity for the following seven months. He was working as a landscaper and gardener at Valley Gardens on Piedmont Road in Charleston and the last record of Dr. John prior to the accident in question (February 27, 2001) indicated that Mr. Pate had suffered no seizures for six months to one year and that his seizures were "well controlled on Dilantin." Mr. Pate was continuing to drive on a valid driver's license - there having been no suspension or revocation by the West Virginia Department of Highways, Division of Motor Vehicles. Mr. Pate testified that he did not recall being told by any doctor or law enforcement official that he was not to drive. (Trial Tr. at 77-78.) This was the status quo as of the date of the accident in question, April 22, 2001.

The plaintiffs claim punitive damages based on Mr. Pate's allegedly willful, wanton, and reckless behavior in continuing to drive. Mr. Pate did admit, when he was called as an adverse witness at trial, that he knew that when he got behind the wheel, there was a possibility that he might have another seizure. (Trial Tr. at 81.) But, at the time of the

accident, Mr. Pate had suffered from only one seizure during the calendar year prior to the date of the accident, that being on September 29, 2000. There was no history of any other seizures occurring between April, 2000 to April, 2001. Also, there was no other evidence presented at trial establishing any malicious misconduct or state of mind on the part of Mr. Pate as of April 22, 2001.

The Appellant took the position at trial that this evidence was insufficient to support an instruction for punitive damages. However, counsel for the plaintiffs offered evidence of other seizure-related activity, additional medical history of Mr. Pate, a letter from the Dunbar Police Department and action taken by the West Virginia Division of Motor Vehicles, all of which occurred after the date of the accident in question, in order to further support their claim for punitive damages. The Appellant strenuously objected to the introduction of any post-accident evidence during pre-trial hearings, during all stages of the trial and in post-trial motions. The Appellant took the position that such evidence was irrelevant as to Mr. Pate's state of mind on April 22, 2001, extremely prejudicial to the defendant and in violation of his due process rights. Additionally, counsel for the Appellant argued that allowing the jury to consider such post-accident evidence would allow Mr. Pate to be punished for conduct unrelated to the plaintiff and would provide the plaintiff a windfall. (Hearing Tr. of October 20,2003 at 23-24; Trial Tr. at 28-38,117, 239,241-242.)

One of the pieces of evidence plaintiffs sought to introduce was a memorandum from the DMV

pertaining to persons with seizure disorders driving after having suffered seizures. There was no law, statute, rule or regulation in the West Virginia Code or the Code of State Regulations in effect on the date of the accident specifically pertaining to individuals with seizure disorders. The memorandum stated, in pertinent part:

> In regard to seizure disorders, there are no specific Regulations on which to rely, however, the Division of Motor Vehicles and/or the Driver's License Advisory Board will review each individual Applicant's medical history to determine whether or not that person should be licensed. In cases where no seizure activity has been reported within the past year, applications will be approved if no other significant health problems exists.
>
> If seizure activity has occurred, the Division of Motor Vehicles will review the individual's medical history to ascertain the frequency and severity of such seizures. In general, an applicant must remain seizure free from 12 months before being approved for driving. This is in accordance with the recommendations from past and current Medical Review Board members.

(Emphasis added.)

Based solely on this memorandum, the circuit court instructed the jury that "the West Virginia Department of Transportation, Division of Motor Vehicles requires an individual to remain seizure free for 12 months in order to be permitted to drive upon the public highways of the State of West Virginia." (Trial Tr. at 319.) Significantly, the date of this memorandum was April 30, 2002, more than one year after the date of the accident herein.

At trial, the plaintiffs called David Bolyard, a representative of the DMV in order to introduce the memorandum and to have him discuss the meaning of the document. On cross-examination, it was pointed out that the memorandum, was dated a full year after the accident herein. (Trial Tr. at 256-257.) Mr. Bolyard responded that there was a similar memorandum in effect as of April 22, 2001. (Trial Tr. at 256-257.) However, the "similar memorandum" was never introduced as an exhibit at trial and was never produced in discovery. In fact, "the similar memorandum" has never been seen by the circuit court, nor by any of the litigants in this case or their counsel.

Moreover, the Appellant objected to Mr. Bolyard being called in the first instance because he was never specifically identified as a witness. The plaintiffs' pre-trial memorandum dated October 8, 2003, and then again on December 18, 2003, indicated that they may call "a representative from the Department of Highways." The first scheduling order required that fact witnesses be disclosed by October 15, 2002. The second scheduling order required that fact witnesses be disclosed by May 1,

2003. The third scheduling order continued the trial from October 27,2003, to January 5, 2004, but made no provision for additional time for disclosure of additional fact witnesses. Notwithstanding these deadlines, the witness designated as "a representative from the Department of Highways" was not listed by the plaintiffs until their pre-trial memorandum dated October 8, 2003, approximately two weeks before the original trial date. The name David Bolyard was never mentioned until the morning of the first day of trial for the purposes of voir diring the jury. (Trial Tr. at 239, 242.)

More importantly, the Appellant objected to Mr. Bolyard testifying as a witness because his involvement with Mr. Pate was entirely subsequent to the date of the accident in question, April 22, 2001. The DMV did not have notice of the accident in question until approximately five months after it occurred. (Trial Tr. at 241,247-248 (9/6/01 letter from Dunbar Police Report, Ex. 15).) (See also Pre-Trial Hearing Tr. of October 20, 2003 at 23-24 and Trial Tr. at 28-38.)

The plaintiffs also indicated that they would call Dr. Hanry Reahl, a neurologist in Charleston, who treated Mr. Pate from July 2, 2001 (more than two months after the accident in question) until the time of trial. The Appellant objected to Dr. Reahl being called to testify as a witness because all of his treatment of Mr. Pate occurred after the date of the accident in question. The Appellant's second motion in limine asked the circuit court to prohibit Dr. Reahl from testifying. Over the Appellant's objection, Dr. Reahl was allowed to testify about his treatment

of Mr. Pate. More specifically, Dr. Reahl was allowed to testify that Mr. Pate did not inform the doctor of the particulars of the accident in question. Moreover, Dr. Reahl was allowed to testify that he warned Mr. Pate not to drive until the following March, 2002, and that Mr. Pate disobeyed his orders and continued to drive and was, in fact, involved in a subsequent accident of September 4, 2001. (Trial Tr. at 120, 125-127.)

The Appellant's first motion in limine moved to prohibit any subsequent act evidence from being introduced at trial. The Appellant objected to the introduction of such evidence because it did not and could not show Mr. Pate's state of mind at the time of the April 22,2001 accident; it would allow the jury to punish Mr. Pate for actions not involving the plaintiffs; and it would allow the plaintiff to receive a financial benefit from conduct by Mr. Pate that had no bearing on the plaintiffs. (Hearing Tr. of October 20, 2003 at 23-24; Trial Tr. at 28-38, 240.) The circuit court overruled the Appellant's motion and allowed the testimony not only of Dr. Realil, but of the DMV representative, David Bolyard. (Trial Tr. at 120,243.)

Once on the witness stand, Mr. Bolyard was not only permitted to testify as to the memorandum of April 30,2002, he was also allowed to testify with respect to a letter that he received from Matthew Arthur of the Dunbar Police Department dated September 6, 2001. Officer Arthur's letter to the DMV indicated that Mr. Pate had been involved in two vehicular accidents within the previous year, both of which were caused by seizures (i.e., the

accident at issue, April 22, 2001, and the subsequent accident of September 4, 2001). In the letter, Officer Arthur indicated that it was his opinion that, if Mr. Pate continued to drive, he would be a "threat to public safety." The second accident of September 4, 2001, was the same subsequent accident referred to by Dr. Reahl which occurred five months after the accident in question. The Appellant objected to the introduction of this letter because it constituted post-accident evidence which was extremely prejudicial to the Appellant and because it had no relevance to Mr. Pate's state of mind on April 22, 2001. In reading the letter to the jury, Mr. Bolyard, was testifying as to "facts" stated by a Dunbar police officer, who himself had not witnessed either accident. (Trial Tr. at 247-250.) Over the Appellant's objection, the circuit court allowed the introduction of the September 6, 2001 letter into evidence as Plaintiffs' Exhibit 15. (Trial Tr. at 248,250-251.)

The plaintiffs also offered to introduce an. official notice of suspension of Mr. Pate's driving privileges dated October 16, 2001, apparently suspending his driving privileges as of October 21, 2001. The Appellant objected to this exhibit because it also constituted post-accident evidence, having been generated approximately six months after the accident in question, and because it was obviously prejudicial to Mr. Pate and did not demonstrate his state of mind as of April 22, 2001. If the notice had any probative value at all, it was to demonstrate that Mr. Pate's license was valid and in effect until October 21, 2001, six months after the accident in question. (Mr. Bolyard, in fact, so testified. (Trial Tr. at 260.)) The circuit court allowed the introduction of

the October 16, 2001 notice from the DMV to Mr. Pate over the objection of the Appellant. (Trial Tr. at 117-120.)

Subsequent to the jury's verdict in post trial memoranda, plaintiffs contended that Mr. Bolyard was offered solely as a "rebuttal" witness. Yet, "a representative from the Department of Highways" was listed as a witness in the plaintiffs' initial pre-trial memorandum in October of 2003. In addition, Mr. Bolyard was used to introduce documents of which Mr. Pate had no notice, namely, the April, 2002 memorandum about DMV policy regarding drivers with seizure activity, and the letter from the Dunbar Police Department dated September 6, 2001. Mr. Pate and his counsel had never seen either of those documents and knew nothing about them. They were introduced affirmatively through witness Bolyard and not in rebuttal to anything Mr. Pate said.

The plaintiffs also contended in post-trial memoranda that Dr. Reahl was also called as a "rebuttal" witness. However, Dr. Reahl was also listed as a witness on the plaintiffs' pre-trial memorandum and plaintiffs' counsel opposed the Appellant's motion in limine to exclude Dr. Reahl, arguing that the doctor had valuable testimony to give regarding Mr. Pate's treatment after April 22, 2001, which the jury should hear. (Hearing Tr. of October 20, 2003 at 30-33.) More significantly, the majority of the testimony of Dr. Reahl at trial was used affirmatively by the plaintiffs to argue their entitlement to punitive damages, rather than in

rebuttal to anything that Mr. Pate said on the witness stand as an adverse witness.

At the close of evidence, over the Appellant's objection, the Court gave Plaintiffs' Instruction No. 18 defining punitive damages and setting forth the circumstances when punitive damages can be awarded and the standard by which punitive damages could be measured. Appellant argued that the evidence up through and including the date of the accident, including Mr. Pate's one previous seizure-related accident, and the lack of any official or unofficial notice to him to discontinue driving, was not sufficient evidence to support a punitive damage instruction. The circuit court nevertheless gave the instruction.

A verdict was returned in favor of the plaintiffs, which verdict included a punitive damage award of $75,000.00. As noted above, there was also a compensatory award of $49,520.48, to which Mr. Pate did not then and does not now object. In fact, by letter dated February 11, 2004, counsel for Mr. Pate enclosed a check payable to the order of the plaintiffs and their counsel in the amount of $52,138.62 representing the compensatory damage award, plus interest. However, by letter dated the following week, counsel for the plaintiffs returned the draft indicating that partial, payment on the verdict was unacceptable to the plaintiffs' counsel.

III. ASSIGNMENTS OF ERROR

A. THE CIRCUIT COURT ERRED IN ALLOWING EVIDENCE OF POST-ACCIDENT CONDUCT

TO BE ADMITTED ON THE ISSUE OF PUNITIVE DAMAGES.

B. THE CIRCUIT COURT COMMITTED "PLAIN ERROR" IN INSTRUCTING THE JURY ABOUT DMV "REQUIREMENTS" GOVERNING INDIVIDUALS WITH SEIZURE DISORDERS, THAT DID NOT EXIST.

C. THE CIRCUIT COURT MISAPPLIED THE STANDARDS OF GARNES AND ALKIRE AND OTHERWISE ERRED IN REVIEWING THE JURY'S PUNITIVE DAMAGE AWARD.

IV. POINTS OF LAW AND CITATION OF AUTHORITIES

Our punitive damage jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person **entitles** that person to *a* punitive damage award under Mayer v. Frobe, 40 W. Va. 246, 22 S.E.58 (1895); second, if a punitive damage award is justified, then a review is mandated to determine if *the* punitive damage award is excessive under Games v. Fleming Landfill, Inc., 186 W. Va. 656,413 S.E.2d 897 (1991).

Syllabus Point 7, Alkire v. First National Bank of Parsons, 197 W. Va. 122, 475 S.E.2d 122 (1996).

In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative

enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.
Syllabus Point 4, Mayer v. Frobe, 40 W. Va. 246, 22 S.E.58 (1895).

Wanton negligence is defined in Black's Law Dictionary, 3rd Ed. 1233, as "Reckless indifference to the consequences of an act or omission, where the party acting or failing to act is conscious of his conduct and, without any actual intent to injure, is aware, from his knowledge of existing circumstances and conditions, that his conduct will inevitably or probably result in injury to another."

Stone v. Rudolph, 127 W. Va. 335, 32 S.E.2d 742 (1945).

A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct 1513 (2003).

The defendant's conduct sanctioned by punitive damages must be that which actually

injured the plaintiff, and not other unrelated acts committed at other times and places.

TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 443 (S.D.N.Y. 2003).

Courts cannot award punitive damages to plaintiffs for wrongful behavior that they did not themselves suffer. Tying punitive damages to the harm actually suffered by the plaintiff prevents punishing defendants repeatedly for the same conduct: If a jury fails to confine its deliberations with respect to punitive damages to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general, it may award exemplary damages for conduct that could be the subject of an independent lawsuit, resulting in a duplicative punitive damages award.

Williams v. ConAgra Poultry Co., 378 F.3d 790 (8th Cir. 2004).

The post-accident driving record of a defendant is inadmissible on the punitive damage issue, because the post-accident conduct is not material or relevant to the defendant's motives or state of mind at the time of the incident in question.

DeMatteo v. Simon, 112 NM. 112, 812 P. 2d 361 (1991).

It is seemingly impossible to show a defendant's state of mind and/or conscious disregard, with occurrences which were subsequent in time to the event from which the negligence arose.

Such evidence is extremely prejudicial to the defendant on the issue of punitive damages

Cappara v. Schibley, 85 Ohio St. 3d 403, 709 N.E.2d 117 (1999).

Evidence of the parties' conduct subsequent to the event which produces plaintiffs claim for punitive damages, whether aggravating or mitigating, must be probative of the defendant's state of mind at the time of the transaction.

Byers v. Santiam Ford, Inc., 281 Or. 411, 574 P.2d 1122 (1978).

Evidence of the defendant's subsequent driving record would run afoul of the requirement that punitive damages be connected to and proportional to the actual, compensatory damages suffered by the plaintiff.

Wohlwend v. Edwards, 796 N.E.2d 781 (Ind. App. 2003).

When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the offering party is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the offering party or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from

the record and that purpose alone must be told to the jury in the trial court's instruction

Stafford v. Rocky Hollow Coal Co., 198 W.Va. 593, 482 S.E.2d 210 (1996).

Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.

BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589(1996).

Due process demands that a person not be penalized without reasonable warning of the consequences of his acts.

Garnes v. Fleming Landfill Inc., 186 W.Va. 656, 413 S.E.2d 897(1991).

The due process clause found in Article III, §10 of the Constitution of West Virginia requires that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he or she may act accordingly.

Syllabus, point 7, State ex rel Hechler v. Christian Action Network, 201 W. Va. 71, 491 S.E.2d 618 (1997).

The court may, in the interest of justice, notice plain error in the giving or refusal to give an instruction, whether or not it has been made subject

of an objection. To trigger application of the "plain error" doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

Keesee v. General Refuse Service. Inc., 604 S.E.2d 449 (W. Va. 2004).

V. STANDARD OF REVIEW

This Court's review of the propriety of the punitive damages award is *de novo.* Boyd v. Goffoli, W.Va. S.E.2d (Nov. 29, 2004). *See also* Aken v. Plains Electric Generation & Transmission Cooperative. Inc., 132 N.M. 401, 49 P.3d 662 (2002) (concluding that *de novo* review of a punitive damage award by an appellate court, as mandated by Cooper Industries v. Leatherman Tool Group. Inc., 532 U.S. 424, 121 S.Ct. 1648 (2001), was imposed by Cooper Industries "as a matter of federal constitutional imperative" and, therefore, was binding on state appellate court as well).

VI. ARGUMENT

A. THE CIRCUIT COURT ERRED IN ALLOWING EVIDENCE OF POST-ACCIDENT CONDUCT TO BE ADMITTED ON THE ISSUE OF PUNITIVE DAMAGES.

In Syllabus Point 7 of Alkire v. First National Bank of Parsons, 197 W. Va. 122, 475 S.E.2d 122 (1996), this Court held:

> Our punitive damage jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to *a* punitive damage award under Mayer v. Frobe, 40 W. Va. 246, 22 S.E.58 (1895); second, if a punitive damage award is justified, then a review is mandated to determine if *the* punitive damage award is excessive under Garnes v. Fleming Landfill. Inc., 186 W. Va. 656, 413 S.E.2d 897 (1991).

(Emphasis in original.)

In Syllabus Point 4 of Alkire, this Court reiterated the standard for the type of conduct that justifies an award of punitive damages that Mayer v. Frobe had established over a century ago:

> "In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous." Syllabus Point 4, Mayer v. Frobe, 40 W. Va. 246,22 S.E. 58 (1895).

In this case, plaintiffs assert that Mr. Pate's conduct was "wanton, willful or reckless" so as to

justify the award of punitive damages. Thus, this Court's first task under Alkire, is to review the underlying facts to determine "whether the conduct of [Mr. Pate] toward [the plaintiffs] entitles [the plaintiffs] to *a* punitive damage award under Mayer v. Frobe."

The "issue of whether there is sufficient evidence to justify an award of punitive damages is a question of law' for the court." Radec, Inc. v. Mountaineer Coal Development Company, 210 W.Va. 1, 10 n.1, 552 S.E.2d 377, 386 n.1 (Justice Scott, dissenting, *citing* Marshall v. El Paso Natural Gas Co., 874 F.2d 1373, 1384 (10th Cir. 1989)). *See also* Austin v. C&L Trucking, Inc., 610 F.Supp. 465, 472 (D. Nev. 1985) ("Whether the record contains sufficient evidence to justify an award of punitive damages is a question of law, and for the court to decide."); EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1244 (10th Cir. 1999) ("Whether sufficient evidence exists to support punitive damages is a question of law reviewed *de novo.")*.

To properly accomplish the initial task of determining whether sufficient evidence existed to meet the type of conduct required under Mayer v. Frobe to justify an award of punitive damages, it is first necessary to address the question of what type of conduct constitutes "willful, wanton or reckless" conduct. Sixty years ago, in Stone v. Rudolph, 127 W. Va. 335, 32 S.E.2d 742 (1945), this Court undertook an "investigation as to what is meant by willful and wanton misconduct." Id. at 345, 32 S.E.2d at 748.

In Stone, this Court observed that:

> Wanton negligence is defined in Black's Law Dictionary, 3rd Ed. 1233, as "Reckless indifference to the consequences of an act or omission, where the party acting or failing to act is conscious of his conduct and, without any actual intent to injure, is aware, from his knowledge of existing circumstances and conditions, that his conduct will inevitably or probably result in injury to another." And in the same work on page 1234, it is stated that "'Willful negligence' implies an act intentionally done in disregard of another's rights, or omission to do something to protect the rights of another after having had such notice of those rights as would put a prudent man on his guard to use ordinary care to avoid injury."
>
> In 38 Am.Jur. 692, it is said: "An omission to exercise care which amounts to a lack of regard for the safety of others is willful or wanton. Willfulness or wantonness imports premeditation or knowledge and consciousness that injury is likely to result from the act done or from the omission to act.

Id. at 345-46,32 S.E.2d at 748, emphasis added.

The Court has also noted that:

> The usual meaning assigned to 'willful,' 'wanton' or 'reckless,' according to taste as to the word used, is that the actor has *intentionally* done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a *conscious* indifference to the consequences, amounting almost to willingness that they shall follow; and it has been said that this is indispensable.

Cline v. Joy Manufacturing Co., 172 W. Va. 769, 772 n.6, 310 S.E.2d 835, 838 n.6 (1983), quoting W. Prosser, Handbook of the Law of Torts 185 (4th Ed. 1971)(emphasis added by the Court).

When combined with the dictates of State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408,123 S.Ct. 1513 (2003), the United States Supreme Court's most recent pronouncement on punitive damages, these definitions emphasize two critical points that are relevant to the propriety of a punitive damage award to these plaintiffs as a result of the April 22.2001 accident. First, it was Mr. Pate's "knowledge of existing circumstances and conditions" on April 22, 2001, and only on April 22, 2001, that can be relevant to the plaintiffs' entitlement to an award of punitive damages.

Second, punitive damages cannot be awarded against Mr. Pate "to punish and deter conduct that bore no relation to the [plaintiffs'] harm." Campbell. 123 S.Ct, at 1523.

Thus, the circuit court clearly erred in allowing the admission of substantial evidence of conduct by Mr. Pate that occurred after his April 22, 2001 accident with Mr. Willis. Any conduct by Mr. Pate after April 22, 2001 could not possibly have any relation to the harm suffered by the plaintiffs, because the plaintiffs' harm only occurred and resulted from the accident of that date. As the court in TVT Records v. Island Def Jam Music Group, 279 F.Supp.2d 443 (S.D.N.Y. 2003), has recently observed after an extensive analysis of Campbell and the United States Supreme Court's other punitive damage jurisprudence, "[t]he defendant's conduct sanctioned by punitive damages must be that which actually injured the plaintiff, and not other unrelated acts committed at other times and places." Id. at 437. The circuit court erred by admitting substantial evidence of conduct which occurred well after April 22, 2001 and which conduct clearly had: no effect at all on the plaintiffs.

The admission by the trial court of substantial evidence of conduct and facts that occurred after April 22, 2001 and the unquestioned reliance by plaintiffs on that conduct in their case, was a violation of Mr. Pate's due process rights and clearly "poisoned the well" against Mr. Pate. The improper admission of such evidence renders the punitive damage award in this case unreliable, inappropriate and constitutionally impermissible.

The Eighth Circuit recently explained that, in Campbell:

> the Supreme Court emphasized that courts cannot award punitive damages to plaintiffs for wrongful behavior that they did not themselves suffer. Tying punitive damages to the harm actually suffered by the plaintiff prevents punishing defendants repeatedly for the same conduct: If a jury fails to confine its deliberations with respect to punitive damages to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general, it may award exemplary damages for conduct that could be the subject of an independent lawsuit, resulting in a duplicative punitive damages award.

Williams v. ConAgra Poultry Co., 378 F.3d 790, 797 (8th Cir. 2004). By allowing the admission of evidence of Mr. Pate's post-accident conduct — including the admission of his subsequent accident which occurred in September 2001 — the trial court clearly violated this dictate of Campbell.

Nor was the subsequent conduct of Mr. Pate relevant to his state of mind on April 22,2001. In DeMatteo v. Simon, 112N.M. 112, 812 P.2d 361 (1991), the court held:

> The post-accident driving record [of the defendant] was also inadmissible on the

> punitive damage issue, because the post-accident conduct was not material or relevant to [the defendant's] motives or state of mind at the time of the incident in question.

Id. at 114, 812 P.2d at 363. Likewise in this case, post-accident conduct cannot be relevant to Mr. Pate's motives or state of mind on April 22, 2001. Under West Virginia law, to determine whether Mr. Pate was guilty of "willful, wanton or reckless" conduct, the focus must be on Mr. Pate's state of mind on the date of that conduct; *i.e.*, April 22, 2001. As noted above, Stone places the focus on Mr. Pate's "knowledge of existing circumstances and conditions" on the date of the accident.

The Ohio Supreme Court has ruled similarly. In Cappara v. Schibiev, 85 Ohio St. 3d 403, 406-07, 709 N.E.2d 117, 120 (1999), the court agreed with a lower court's ruling that "[i]t is seemingly impossible to show ... a defendant's state of mind and/or conscious disregard, with occurrences which were subsequent in time to the event from which the negligence arose." Moreover, the court noted that such evidence "was extremely prejudicial to [the defendant] on the issue of punitive damages." Id. at 407, 709 N.E.2d at 120. The same is obviously tree in this case.

Likewise, in Byers v. Santiam Ford. Inc., 281 Or, 411, 416, 574 P.2d 1122, 1125 (1978), the Oregon Supreme Court stated, "[e]vidence of the parties' conduct subsequent to the event which produces plaintiffs claim for punitive damages, whether

aggravating or mitigating, must be probative of the defendant's state of mind at the time of the transaction." The post-accident evidence allowed by the circuit court had nothing to do with Mr. Pate's state of mind on April 22, 2001.

Furthermore, the admission of such evidence was in violation of Rule 404(b) of the West Virginia Rules of Evidence. The plaintiffs failed to articulate the alleged reason that such conduct was even arguably admissible under Rule 404(b) (as mandated by Stafford v. Rocky Hollow Coal C , 198 W.Va. 593,482 S.E.2d 210 (1996)), and the trial court failed to adequately instruct the jury under Stafford. Additionally, under the clear language of Rule 404(b), Mr. Pate's acts committed after the April 22, 2001 accident (alleged by plaintiffs to be willful, wanton and reckless), are not admissible to show that Mr. Pate's conduct at the time of the April 22, 2001 accident was similarly willful, wanton and reckless. *See e.g.* R.E. Linder Steel Erection Co., Inc. v. Wedemeyer, Cemik, Corrubia, Inc., 585 F.Supp. 1530 (D. Md. 1984).

Wohlwend v. Edwards, 796 N.E.2d 781 (Ind. App. 2003), another case cited by defendant Pate to the trial court, but ignored by the court below, is particularly significant because it was decided after Campbell and included the United States Supreme Court's dictates in its analysis. In Wohlwend, the trial court admitted evidence that, subsequent to the accident in question, the defendant (who was intoxicated at the time of his automobile accident with the plaintiff) "had twice been arrested for operating a vehicle while intoxicated." Id. at 783.

The jury awarded punitive damages against the defendant.

In reversing the award of punitive damages, the Court of Appeals in Wohlwend observed:

> When the jury heard evidence of Wohlwend's subsequent driving record, there was a danger that it would punish Wohlwend for his subsequent acts and not for his behavior vis-a-vis [the plaintiff].
>
> . . . we conclude that such evidence would run afoul of the requirement that punitive damages be connected to and proportional to the actual, compensatory damages suffered by the plaintiff.

Id. at 785.

The court also pointed out that:

> This is one of our chief concerns with allowing evidence of Wohlwend's subsequent conduct. If the jury were to punish Wohlwend for his subsequent acts in addition to the conduct which harmed Mrs. Edwards, there would be a risk of multiple punishment. In future suits based upon this subsequent conduct, Wohlwend could conceivably be punished yet again for the acts

> which were taken into consideration in punishing him in the previous trial. For the jury to punish Wohlwend for such subsequent conduct would detach the propriety and/or amount of punitive damages from the compensatory damages due the plaintiffs. This would be violative of the spirit of Indiana common and statutory law and the Due Process Clause of the Fourteenth Amendment.

Id. at 787. Clearly, the award of punitive damages against Mr. Pate in this case (when such award was necessarily based on facts which occurred after the April 22, 1001 accident) violates his right to Due Process under both the United. States and West Virginia Constitutions.

Additionally, plaintiffs' reliance on the actions of the Division of Motor Vehicles with regard to Mr. Pate, renders an award of punitive damages against Mr. Pate inappropriate and constitutionally suspect. As noted above, Plaintiffs were permitted to introduce into evidence an April 30,2002 memorandum (dated over one year after the accident that gives rise to this lawsuit) from DMV, which stated, in part, that, "[i]n regard to seizure disorders, there are no specific Regulations on which to rely." (Emphasis added.) Significantly, the DMV memo also confirmed that "applicants" with seizure disorders would be reviewed by DMV on a case by case basis, stating that: "If seizure activity has occurred, the Division of Motor Vehicles will review the individual's medical history to ascertain the

frequency and severity of such seizures. In general, an applicant must remain seizure free from 12 months before being approved for driving." (Emphasis added.) The circuit court then instructed the jury about alleged DMV "requirements" for individuals with seizure activity. *See* Argument at Section VLB., *infra*.

In BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996), the United States Supreme Court stated:

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject her to punishment, but also of the severity of the penalty that a State may impose.

Id. at 574, 116 S.Ct, at 1598. *See also* Vandevender v. Sheetz. Inc., 200 W.Va. 591, 598, 490 S.E.2d 678, 685 (1997) (Punitive damage awards are the equivalent of civil penalties which implicate "the basic protections against 'judgments without notice' afforded by the Due Process Clause..." *(quoting* BMW).) Indeed, in Games v. Fleming Landfill Inc.,

186 W.Va. 656, 668, 413 S.E.2d 897, 909 (1991), this Court observed that, "[d]ue process demands ... that a person not be penalized without reasonable warning of the consequences of his acts." (Emphasis added.) This Court has also held that:

> The due process clause found in Article III, §10 of the Constitution of West Virginia requires that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he or she may act accordingly.

Syllabus, point 7, State ex rel Hechler v. Christian Action Network, 201 W. Va. 71, 491 S.E.2d 618 (1997).

Significantly, the DMV memo confirms that there are no standards set forth in either the statutes or the regulations which would put Mr. Pate or any other driver on notice of what conduct was acceptable on April 22, 2001 under -the facts and circumstances which existed on that date. How then, could Mr. Pate conform his conduct to the standards required by the State of West Virginia when no such standards existed and, to the extent that the authorities could regulate such conduct, such regulation was done on a case-by-case basis? Of equal significance is the question of how this Court can permit an award of punitive damages to punish Mr. Pate for his conduct on April 22, 2001, when Mr. Pate had no fair notice of what conduct (with regard to his seizure disorder) might subject him to punishment. To do so would be the most fundamental of due process violations.

Admission of evidence about these non-existent standards of conduct was clearly erroneous.

B. THE CIRCUIT COURT COMMITTED "PLAIN ERROR" IN INSTRUCTING THE JURY ABOUT DMV "REQUIREMENTS" GOVERNING INDIVIDUALS WITH SEIZURE DISORDERS, THAT DID NOT EXIST.

As set forth above, the circuit court gave a portion of plaintiffs' Instruction No. 19 which stated that "the West Virginia Department of Transportation, Division of Motor Vehicles requires an individual to remain seizure free for 12 months in order to be permitted to drive upon the public highways of the State of West Virginia." (Trial Tr, at 319, emphasis added.) Counsel for Mr. Pate objected to the introduction of the DMV memorandum, objected to Mr. Bolyard testifying about anything, objected to any of the circumstances of any subsequent accident evidence being introduced, and objected to the circuit court's giving any instruction regarding punitive damages. It is true, however, that counsel did not specifically object to this instruction as an incorrect statement of the law.

Yet, as demonstrated above, the instruction clearly is an incorrect statement of the law. There is no statute, rule or regulation which "requires" an individual to "remain seizure free" to be "permitted to drive." In fact, the DMV's "policy," which was not promulgated or published in any manner to tie public, suggests that DMV will review the "frequency and severity" of an individual's seizures

and make a subjective, case-by-case decision on any "applicant" for a drivers license who experiences seizures.

The law is clear that this Court may, in the interest of justice, notice plain error in the giving or refusal to give an instruction, whether or not it has been made subject of an objection. "To trigger application of the "plain error" doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syllabus point 12, Keesee v. General Refuse Service. Inc., 604 S.E.2d 449 (W.Va. 2004).

There can be little doubt that the giving of this clearly erroneous instruction affected Mr. Pate's substantial rights and affected the fairness of the proceeding. In his closing argument, plaintiffs' counsel stated: "Then, if you take that seizure of October 3rd [2000] that [Mr. Pate] talked about, take that into consideration, he should not have been driving on April 22nd, 2001. That's the law in the State of West Virginia." (Trial Tr. at 324, emphasis added.) Plaintiffs' counsel clearly argued that Mr. Pate violated "the law" based on an instruction that was clearly an erroneous statement of the law. Moreover, the focus of counsel's argument was that Mr. Pate violated this "law" by driving a vehicle on the date of the accident in question. Application of the plain error doctrine in this situation is appropriate.

C. THE CIRCUIT COURT MISAPPLIED THE STANDARDS OF GARNES AND ALKIRE AND OTHERWISE ERRED IN REVIEWING THE JURY'S PUNITIVE DAMAGE AWARD.

In Alkire, this Court established "a two-step paradigm" for review of a punitive damages award. First, the reviewing court must examine the issue of entitlement, or as the Court stated in Syllabus point 7, "a determination of whether the conduct of an actor toward another person entitles that person to *a* punitive damage award under Mayer v. Froba" (Emphasis in original.) If the reviewing court is satisfied that the plaintiff has satisfied this burden and that "a punitive damage award is justified," then the reviewing court must review and analyze the amount of the award to determine whether it is excessive under Games.

Alkire makes clear, however, that the Garnes "factors" are not related to the issue of entitlement, but rather are related to the issue of the amount of the punitive award. In Syllabus Point 5 of Alkire, the Court stated that "it is imperative that the amount of the punitive damage award" be reviewed by the trial court "by applying the model specified in Syllabus Points 3 and 4 of Garnes." (Emphasis added.) Likewise in Syllabus Point 6, the Court stated that, "[e]very post-trial analysis as to the amount of the punitive damage award should be conducted by the trial court exclusively within the boundaries of Syllabus Points 3 and 4 of Garnes." (Emphasis added.)

In conducting its post-trial review, the circuit court erroneously confused and overlapped these two separate and distinct issues. Subparagraph 2 of Syllabus Point 3 of Games indicates that, "[t]he jury should take into account how long the defendant continued in his actions,..." The circuit court apparently believed that this language in Garnes could justify consideration of Mr. Pate's post-accident conduct on all issues including the issue of entitlement.

In paragraph 6 of the Conclusions of Law contained in the circuit court's June 28, 2004 Order upholding the jury's punitive damage award, the circuit court stated: "Upon review of the evidence presented in this case, this Court believes that Mr. Pate's conduct warrants an award of punitive damages. In arriving at this decision, the Court found ... Mr. Pate continued to drive even after having the collision with Mr. Willis that had resulted in a serious injury to Mr. Willis, which further established a total disregard for the safety of others." (June 28, 2004 Order at Conclusions of Law *1*6.d., emphasis added.) The circuit court's express finding that plaintiffs' entitlement to punitive damages was justified, even in part, by Mr. Pate's conduct after the April 22, 2001 accident, was clearly both an erroneous application of Garnes and a violation of the United States Supreme Court's mandate in Campbell that punitive damages cannot be awarded against a defendant "to punish and deter conduct that bore no relation to the [plaintiffs'] harm." Campbell, 123 S.Ct at 1523.

The circuit court also violated Campbell in conducting its analysis of the "reprehensibility of Mr. Pate's conduct." (June 28, 2004 Order at Conclusions of Law ¶ 11.) In Campbell, the Supreme Court stated that "[d]ue process does not permit courts, in the calculation of punitive damages to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 123 S.Ct. at 1523. The circuit court's reliance on post-accident conduct in this regard was inappropriate. Moreover, the circuit court's conclusion that the reprehensibility of the Appellant's conduct was supported by "Mr. Pate's attempt to conceal his seizure related collisions from his treating physician as illustrated by the testimony of Dr. Harry Reahl" (June 28, 2004 Order at Conclusions of Law ¶ 11 .e.), was erroneous. "An innocent or negligent act could not be converted into a wanton and willful one by the fact that [the] defendant thereafter sought by improper means to justify his mistake." O'Harra v. Pundt, 210 Or. 533, 551, 310 P.2d 1110, 1119(1957).

The circuit court's review of the punitive damage award under Alkire and Garnes should also have been conducted *de novo*. The post-trial review of a punitive damages award by the circuit court is a unique process limited to punitive damages cases. Significantly, the post-trial review of a punitive damages award by the circuit court is mandated as a matter of constitutional due process. This makes the circuit court's task a question of law. Thus, the circuit court should not be concerned in its post-trial review about evidentiary or jury instruction issues. Indeed, the circuit court needs no instructions about

the law. The circuit court should simply apply the law in conducting its review of the evidence on both issues of entitlement and amount.

Appellant also challenges the circuit court's conclusion in paragraph 14 of the June 28, 2004 Order. Appellant acknowledges that Games suggests that a reviewing court is not precluded "from taking into consideration the defendant's insurer's ability to pay and all efforts towards settlement when the court undertakes his or her post-verdict review of a punitive damage award." 186 W.Va. at 669, 413 S.E.2d at 910. Appellant submits, however, that this dicta in Garnes allows the reviewing court to engage in a practice that is constitutionally impermissible, particularly in a case such as this one where the plaintiffs are already asserting a claim against Mr. Pate's insurer under the West Virginia Unfair Claims Settlement Practices Act.

Under Garnes, the focus of attention is on the conduct of the defendant. Subparagraph 2 of Syllabus Point 3, of Garnes includes as a factor to consider, "offer[s] of a fair and prompt settlement for the actual harm caused once [the defendant's] liability became clear to him." When a defendant has liability insurance, however, he has no control over the settlement of claims asserted against him that are covered by his insurance policy. Under the insurance policy, the defendant contracts away this right to the insurer.

To further complicate this issue, however, most insurance policies exclude coverage for punitive damages. *See e.g.* State ex rel. State Auto Ins. Co. v.

Risovich, 204 W.Va. 87, 511 S.E.2d 498 (1998). Thus, in virtually every claim for punitive damages, issues of coverage between the defendant and his insurer are possible, if not probable. Furthermore, the conduct of insurers in West Virginia is subject to certain statutory and regulatory schemes and common law decisions that govern the conduct of the insurer but not the insured. To allow a reviewing court to consider the conduct of the insurer with regard to "fair and prompt" offers of settlement, in deciding whether and how to impose a civil penalty on the insured, cannot comport with due process.

Finally, even if circuit court correctly determined that an award of punitive damages against Mr. Pate was appropriate, it was required to review whether the award was excessive under Garnes. While Appellant reiterates that any award of punitive damages in this case was improper and constitutionally suspect, it is clear that the amount of punitive damages awarded by the jury was excessive under the circumstances present herein.

In BMW, the United States Supreme Court stated that, "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." 517 U.S. at 568, 116 S.Ct, at 1595. The Court then observed that under the due process principles of the federal constitution, the "excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." Id.

In this case, plaintiffs seek to punish Mr. Pate for driving a motor vehicle when they contend he should not have been doing so and to deter him from doing so in the future. However, Mr. Pate has already been "deterred" from driving a vehicle because he lost his privilege to drive for a period of at least one year and voluntarily agreed to forego driving for the rest of his life. What state interest is furthered by imposing a $75,000.00 punishment on Mr. Pate in addition to the consequences that he has already incurred?

Of equal significance is the question of whether it is appropriate for the circuit court (and this Court) to impose such a severe punishment on an individual whose conduct was the result of a disability over which he has no control. In light of these factors, it is clear that the existing punitive damage award is excessive and the circuit court erred in upholding the award.

VII. RELIEF PRAYED FOR

For the reasons set forth herein, the Appellant, James Pate, prays that this Court accept this petition for appeal and reverse and vacate the September, 7 2004 Order of the Circuit Court of Kanawha County, West Virginia, and order that Appellant be granted judgment as a matter of law on the plaintiffs' claim for punitive damages or, alternatively, order that Appellant be granted a new trial on the plaintiffs' claim for punitive damages, and grant the Appellant such other and further relief as the Court deems appropriate.

JAMES PATE
By Counsel

/s/ John J. Polak
David A. Mohler (WVSB #2589)
John J. Polak (WVSB #2929)

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CERTIFICATE OF SERVICE

I, John J. Polak, counsel for Plaintiff, do hereby certify that service of the "PETITION FOR APPEAL ON BEHALF OF JAMES PATE" was made upon the parties listed below by mailing a true and exact copy thereof to:

Tony L. O'Dell, Esquire
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CAMPBELL, WOODS, BAGLEY, EMERSON,
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P.O. Box 1835
Huntington, WV 25719-1835
Counsel for State Farm Insurance Company

in a properly addressed envelope this 7th day of January, 2005

/s/_____
John J. Polak
(WVSB # 2929)

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th of September, 2003, the following order was made and entered:

Charles Kocher, Plaintiff Below,
Appellee

vs.) No. 31539

Oxford Life Insurance Company,
a corporation, Defendant Below,
Appellant

On a former day, to-wit, March 27, 2003, came the petitioner, Oxford Life Insurance Company, by Thomas R. Goodwin and Johnny M. Knisely II, Goodwin & Goodwin, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Wetzel County, rendered on the 8th day of November, 2002, with the record accompanying the petition. Thereafter, on the 31st day of March, 2003, came the respondent, Charles Kocher, by Robert P. Fitzsimmons, Fitzsimmons Law Offices, and Michael W. McGuane, his attorneys, and presented to the Court his written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said petition for appeal as to Assignment of Error #2 only. Justice Maynard would grant as to all issues. Justice McGraw would refuse.

It is hereby ordered that the above-captioned proceeding be heard, submitted and determined upon the original record, briefs of counsel and oral argument, if requested by the parties.

It is further ordered that the appellant file an original and nine copies of a brief within thirty days of receipt of this order; the appellee to file a like number of briefs within thirty days of receipt of the appellant's brief, with any reply brief deemed necessary to be filed within fifteen days of receipt of appellee's brief.

A True Copy

Attest: /s/
Clerk, Supreme Court of Appeals

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

CHARLES KOCHER,
Plaintiff below,
Respondent,

v.

OXFORD LIFE INSURANCE COMPANY,
Defendant below,
Petitioner.

PETITION FOR APPEAL

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No._____

CHARLES KOCHER,
Plaintiff Below,

Respondent,

v.

OXFORD LIFE INSURANCE COMPANY,
Defendant below,

Petitioner.

PETITION FOR APPEAL

Pursuant to W.Va. R. App. P. 3 and W.Va. Code § 58-5-3, Oxford Life Insurance Company ("Oxford") petitions for an appeal of the final judgment of the Circuit Court of Wetzel County, the Hon. Mark A. Karl presiding, in *Kocher v. Oxford Life Insurance Co.*, No. 00-C-51 K (Wetzel (W.Va.) Cir. Ct.). As Oxford will show below, its petition should be granted.

I. Kind of Proceeding and Nature of the Ruling Below

This suit involves claims against Oxford by Respondent Charles Kocher alleging breach of contract, statutory unfair claims settlement practices, and breach of the implied covenant of good

faith and fair dealing. On March 22, 2002, after default judgment had been entered as a sanction, a jury returned a verdict in favor of Kocher in the aggregate principal amount of $39,012,039.60. This verdict was comprised of $11,322.30 in accidental dismemberment benefits under a credit life insurance policy issued to Kocher by Oxford; $717.30 as a refund of Kocher's premium; $5,000,000 for nonspecific "aggravation, annoyance, humiliation, and inconvenience"; and $34,000,000 in punitive damages. Judgment was entered on the verdict on April 9, 2002. Oxford timely moved for a new trial or for a *remittitur* of damages. In an order filed on November 8, 2002, the Circuit Court denied Oxford's motion.

II. Statement of Facts

On April 28, 1999, Kocher bought a truck on credit. Pl. Exh.[1] 23. In order to protect his ability to pay this debt, Kocher simultaneously purchased "Life Accidental Dismemberment Coverage" and "Disability Coverage" from Oxford. He paid $732.56 for this insurance. The amount insured was the total of principal and interest on the loan, or $11,563.20. Pl. Exh. 1 at 28. Less than two weeks later, on May 11, 1999, Kocher badly injured his right foot in a farm accident. As a result of this injury, his foot was partially removed at the midtarsal region. Pl. Exh. 1 at 34.

Kocher notified Oxford of his injury in writing on an initial claim form, which was received by

[1] Unless otherwise indicated, "Exh." refers to a trial exhibit.

Oxford on June 30, 1999 (Pl. Exh. 1 at 37-38). Oxford promptly began making his monthly truck payments under the disability coverage. On the claim form, his physician, Dr. Marjorie Bush, estimated that Kocher would be able to return to work on November 11, 1999, *Id.* At 38. The dismemberment coverage was not then triggered, however, because Kocher had not suffered "the loss of ... [o]ne foot at or above the ankle joint" as the policy bluntly defined the operative occurrence. Kocher described his initial amputation at trial:

> Q. ... [T]here was some heel left?
>
> A. There was some heel left, yes.
>
> Q. Your heel is below your ankle?
>
> A. That's right.

Tr. at 242.

The medical record confirms that Kocher's foot had not been removed "at or above the ankle joint." A radiology report dated June 21, 1999, and provided to Oxford by Dr. Bush, noted an "amputation at the midtarsal region with a generally *intact* subtalar joint. The mortise joint appears *intact* as well." Pl. Exh. 1 at 34 (emphasis added). Kocher changed doctors in the fall of 1999. His new physician, Dr. Gregory Krivchenia, had a similar first impression. Pl. Exh. 1 at 17 (describing the amputation as "in the mid foot area").

On August 2, 1999, Kocher called Oxford and spoke to customer service representative Sandy Rowin. Pl. Exh. 1 at 56. Kocher asked whether the truck would be paid off. Rowin called Dr. Bush's office to ask whether the amputation was total or partial. On August 5, Dr. Bush's office responded that the amputation was "[b]elow the ankle joint[.]" *Id.* at 41, 56.

On August 31, 1999, Dr. Bush sent Oxford a Continuance Claim Form ("CCF"), which Oxford uses to update the status of a disabled insured. Dr. Bush repeated her estimate that Kocher would return to work on or about November 11, 1999. Pl. Exit. 1 at 53. Consequently, as this back-to-work date approached, Oxford sought additional information to either confirm Kocher's return to work or substantiate continued disability. Tr. at 604-605.[2] Through letters to Kocher dated October 22 and November 22, 1999, Oxford asked that a second CCF be submitted with this additional information. Pl. Exh. 1 at 90-94. Receiving no reply from Kocher, Oxford administratively closed the file on December 13, 1999. Pl. Exh. 1 at 69-70.

Although Oxford did not know it at the time, Kocher remained disabled, with ambulation difficult and painful on the remaining heel portion of his foot. These problems led to further surgery. On February 14, 2000, Kocher's lower leg was amputated below

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[2] Kocher conceded at trial that, given the November 11 possible back-to-work date, it was reasonable for Oxford to have inquired about his progress at this time. Tr. at 228-229.

the knee in order to install a prosthesis.[3] Tr. at 192. Oxford was not then notified of this second operation.

Nearly three months later, on May 5, 2000, Oxford received a CCF from Dr. Krivchenia. Pl. Exh. 1 at 52. The diagnosis noted on this form was "Amputation Traumatic Below Knee/Complex," but the second surgery was not described. On May 10, because "[t]here was a new doctor, a new facility, and now a different diagnosis[,]" Oxford requested medical records and a narrative from Dr. Krivchenia. Tr. at 620-623. Dr. Krivchenia did not provide this information until July. Tr. at 626. Nevertheless, within five days of receiving the CCF in May, Oxford had reopened the file, paid the bank for all past due payments on Kocher's loan, and resumed making monthly disability payments.

Meanwhile, on July 11, 2000, unaware that his payments were up-to-date (Tr. at 195), Kocher sold his truck and paid off the balance of his loan. Four days later, he filed this suit. He asserted claims for breach of contract, for breach of the implied covenant of good faith and fair dealing, and for statutory unfair claims settlement practices. His counsel wrote to Oxford at the end of August, demanding $7,304.24 to cover the loan balance paid off by Kocher in July, together with two monthly payments Kocher had apparently made from his own

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[3] This procedure was successful. By November 2000, Kocher was ambulatory, could drive, and had returned to work. Kocher Dep. (Motion for New Trial or Remittitur, Exh. A) at 54-55.

funds. Although Kocher did not agree to settle his claims for the sum demanded, Oxford immediately paid it. Motion for New Trial or Remittitur ("New Trial Motion"), Exh. G, H.

Oxford followed up this payment with good-faith efforts to settle all of Kocher's claims. By letter dated September 19, 2000 – scarcely two months into the litigation - Oxford offered an additional $8,435.00 to settle Kocher's claims and to cover his attorney's fees. New Trial Motion, Exh. H. This offer was not accepted.

The case then progressed at an unhurried pace. Written and document discovery proceeded with minimal intervention from the Circuit Court. In February 2001, the Court did grant Kocher's motion to compel responses to his initial interrogatories and document requests, but Oxford had by then already served its responses on the prior January 17. No Rule 37(b) relief resulted from this minor episode. A scheduling order entered on April 4, 2001, set trial for nearly a full year later, on March 18, 2002.

Oxford continued to seek to settle the matter on reasonable terms. In October 2001, it offered $50,000, which offer was swiftly rejected. Kocher Dep. (New Trial Motion, Exh. A) at 176. Oxford then moved to compel the parties to participate in mediation. Kocher, however, opposed mediation, and the Circuit Court denied Oxford's motion.

As the March 2002 trial date approached, the pace of events accelerated. The parties agreed to an

extension of the discovery date to February 28, 2002, in order to conduct depositions.

On or about February 6, 2002, Oxford's Senior Vice President, Larry Goodyear, was preparing to come to West Virginia for his deposition. After reviewing the file and reading a transcript of Kocher's deposition, he decided on his own initiative that he should apologize to Kocher in person. Tr. at 683-684. He asked his administrative assistant, Kathryn McIntyre, to obtain directions to Kocher's house. She did so, and Goodyear drove to Kocher's home near St. Marys. Tr. at 686-688. The meeting was a friendly one, and Goodyear did in fact apologize. The parties dispute whether Goodyear attempted to settle the case during the visit. *See* Tr. at 205-208, 243-244, 688-690, 725.

Although Goodyear did not then know it, Ms. McIntyre had obtained directions to Kocher's residence by calling directly and representing that Federal Express had a package to be delivered there. Tr. at 731. When in the ensuing days this incident came to light, the Circuit Court ordered Oxford to produce Ms. McIntyre for deposition in West Virginia. McIntyre instead quit her job. Tr. at 754-756.

On February 14, 2002, five weeks before trial, Oxford sought to substitute its counsel and to continue the trial. Although the Circuit Court approved the substitution of Hendrickson & Long as Oxford's counsel, it denied a continuance.

But within a week, for reasons beyond its control, Oxford was forced to change its counsel again. Hendrickson & Long had discovered that one of its partners had filed a cross-claim against Oxford on behalf of a different client in another pending matter, and the firm concluded that it could not undertake or continue to represent Oxford. Because of these changes of counsel, three depositions had to be canceled or postponed, and another was aborted because of a miscommunication.[4]

On March 1, 2002, Kocher filed a motion for sanctions. Three days later, at the pretrial conference, the Circuit Court set the sanctions motion for hearing by telephone on March 7. On March 6, Kocher filed a "supplement" to his motion. Aside from Goodyear's visit, Kocher complained most loudly about the difficulties attendant to Oxford's back-to-back changes of counsel.

On March 7, after a very brief telephonic hearing in which the Goodyear incident and McIntyre's ensuing resignation were the primary subjects of discussion, the Circuit Court granted the

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[4] In particular, Oxford canceled its own depositions of Daniel Selby and Jack Lane, who were expert witnesses offered by Kocher. Kocher's deposition of Oxford's expert Terry Rose was scheduled for February 20, and Oxford notified Kocher's counsel on February 19 that it would have to be rescheduled to a more convenient time. In the confusion caused by its changes of counsel, Oxford simply missed the deposition of Kocher's expert James Varner. Oxford conceded at once that it should pay Kocher's reasonable costs and expenses arising from the aborted Varner deposition. Response to Motion for Sanctions at 6-7.

motion for sanctions, entered judgment by default, stated that Oxford "will not be permitted to put on any witnesses," and awarded attorneys' fees and other costs. Tr. (3/7/02) at 6. Oxford moved to reconsider this order. On March 13, the Court refused, but clarified its ruling as to defense witnesses, permitting Oxford to call those not objected to by Kocher, and then solely on the issue of damages.

The case proceeded to trial on March 18, 2002. Much of the evidence adduced did not concern the pre-suit handling of Kocher's claim, but rather post-suit events, including Oxford's defense of the litigation, and alleged wrongs that had nothing whatever to do with Kocher or his claim. Many critical findings, including Kocher's *entitlement to punitive damages,* were made by the Court. Finally, the case was submitted to the jury, whose only tasks were to fill in one blank on the verdict form awarding damages for "aggravation, annoyance, humiliation, and inconvenience" and a second awarding some amount of punitive damages. In a short time the jury provided its answers.

Judgment was entered on the verdict on April 9, 2002. Oxford timely moved for a new trial or for a *remittitur* of damages. By order filed on November 8, 2002, the Circuit Court denied Oxford's motion in all respects. Upon Oxford's application, this Court issued a stay of the judgment on December 5, 2002.

III. Assignments of Error

1. The Circuit Court erroneously, and in violation of the Due Process Clauses of the West Virginia and United States Constitutions,[5] entered default judgment against Oxford as a sanction.

2. The Circuit Court erroneously directed a verdict for punitive damages.

3. The Circuit Court erroneously permitted the introduction of extensive irrelevant and prejudicial evidence, including events that occurred after the filing of the complaint, evidence concerning Oxford's "medical board," supposed discrepancies between Kocher's certificate of insurance and a group policy issued to the creditor, and other complaints filed against Oxford.

4. The Circuit Court erroneously excluded documents provided by another credit disability insurer, which documents would have rebutted Kocher's testimony.

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[5] Unless the context requires otherwise, Oxford's references throughout this petition to "due process" invoke the protections of both the Fourteenth Amendment to the United States Constitution and Article III, § 10 of the West Virginia Constitution. *See Queen v. West Virginia University Hospitals, Inc.*, 179 W.Va. 95, 365 S.E.2d 375, 383 n.6 (1987) (noting that state constitutional provision is always at least as protective of rights as Fourteenth Amendment).

5. The Circuit Court erroneously took judicial notice that Oxford served a subpoena improperly.

6. The Circuit Court erroneously permitted expert testimony concerning an appropriate award of punitive damages.

7. Kocher's counsel engaged in improper and prejudicial argument, including direct appeals to jury bias.

8. The purported "compensatory" damages are grossly excessive.

9. The purported "compensatory" damages are duplicative punitive damages.

10. Oxford did not have fair notice that its conduct could subject it to the amount of punitive damages awarded, in violation of Oxford's substantive right to due process of law.

11. Punitive damages may not be used to impose West Virginia's law and policy on other states.

12. The award of punitive damages is excessive and was imposed in violation of Oxford's right to procedural due process.

13. Cumulative error warrants reversal.

IV. Points and Authorities Relied Upon

Cases

Abdulla v. Pittsburgh and Weirton Bus Co.,
158 W.Va. 592, 213 S.E.2d 810 (1975)..... 32

Addair v. Majestic Petroleum Co., Inc.,
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V. Summary of Argument

The first and only sanction of Oxford was the ultimate one - default judgment. Default judgment was plainly excessive given the lack of prior sanctions and the legality of the conduct that motivated it The ensuing trial, ostensibly of Kocher's particular claims, was instead a wide-ranging inquisition replete with irrelevant and prejudicial evidence, naked appeals to the jury's distrust of outsiders, and calls for Oxford's destruction.

The resulting verdict was and is a gross injustice. The $5,000,000 awarded for "aggravation" and the like is patently excessive and can be nothing other than a covert punitive damages award. That the jury then overtly awarded the fantastic sum of $34,000,000 in additional punitive damages places this case in a category all its own.

The law and the Constitution do not permit what happened to Oxford in the Circuit Court of Wetzel County. They prohibit a court from directing the jury to award punitive damages. They require fair notice to all of conduct that may be punished and of the severity of the potential punishment They prohibit a state from using punitive damages to impose its regulatory will on its sister states. And they require special procedures to assure that a punitive damages award does not exceed the sum necessary to achieve the state's legitimate interests in punishment and deterrence. Oxford's petition should be granted.

VI. Argument

A. Due Process Requires Full Appellate Review of the Punitive Damages Award

This petition asks for the Court's review of a prodigious assessment of punitive damages, and the petition can and should be granted for that reason alone. Appellate review of an award of punitive damages is an essential component of due process. *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 n.9 (2001) ("[W]e [have]

emphasized the importance of appellate review to ensuring that a jury's award of punitive damages comports with due process."). In this regard, thiss Court has committed itself to "meaningful and adequate" review of every punitive damages award. *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897, 908 (1991); *see Cooper Industries,* 532 U.S. at 443 (due process requires *de novo* review of punitive damages awards). Although the Court has reserved the right to conduct its review on the petition alone, *see* syl. pt. 5, *Garnes,* Oxford submits that, in light of the staggering size of the punitive damages award at issue and the subsequent holding of *Cooper Industries,* due process requires the plenary review of a full appeal.

Review upon appeal will show not just that the punitive damages award is improper, excessive, and unconstitutional, but also that the judgment as a whole is the product of a series of substantial errors, which errors Oxford will now describe.

B. Default Judgment was an Excessive Sanction

Of all the sanctions available to a trial court, default judgment (or dismissal) is the most potent. Because of the law's favor of deciding disputes on the merits — and because of every litigant's constitutional right to due process of law - courts must exercise restraint and patience before entering judgment as a sanction.

> [D]ismissing an action is extremely severe. We have suggested that such a harsh sanction should be used as a last

resort, and that the party facing the sanction should have had fair warning that such a severe punishment was in the offing:

> In almost any conceivable set of circumstances, a circuit court's failure to (1) warn of an impending ultimate sanction, or (2) consider less onerous sanctions before dismissing the case would amount to reversible error.

Mills v. Davis, __ W.Va. __, 567 S.E.2d 285, 291-292 (2002) (quoting *Woolwine v. Raleigh General Hospital*, 194 W.Va. 322, 460 S.E.2d 457, 463 n.8 (1995)). Thus, "it is inappropriate to make use of [the ultimate sanction] unless other steps have first been tried." *Mills*, 567 S.E.2d at 292. Even if there were a pattern of severe, repeated, sanctionable misconduct here — which Oxford denies — no "other steps" were ever tried to quell it. Hence, the sanction was plainly improper.

Moreover, the primary impetus for the Circuit Court's hasty embrace of the ultimate sanction was Larry Goodyear's visit to Kocher's home. *See* Tr. (3/7/02) at 5-6 (Goodyear's "conduct ... was totally impermissible"). But this visit was perfectly *legal*. Rule 4.2 of the West Virginia Rules of Professional Conduct prohibits only *lawyers* from contacting represented parties. Lest there be any confusion on the point, the commentary to the same rule

specifically notes that "parties to a matter may communicate directly with each other[.]" Lawful conduct may not be punished - by sanction, punitive damages, or otherwise. *See Bordenkircher v. Hayes,* 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort[.]").

In addition, Goodyear's visit was not sanctionable because it did not violate a prior discovery order. "'It is well settled that a court cannot impose sanctions pursuant to Rule 37(b)(2) unless and until a specific order pursuant to Rule 37(a) is issued and then violated.'" *Mills,* 567 S.E.2d at 292 (quoting *Williams v. United States,* 215 B.R. 289, 301 (D.R.I. 1997)).[6]

But even if Goodyear's visit was a bad idea or could be thought of as "improper" under some sort of quasi-code of good comportment, it did not harm Kocher at all. "[A] court must ensure any sanction imposed is fashioned to address the *identified harm* caused by the party's misconduct." Syl. Pt. 1 (in part), *Battles v. Hinkle,* 196 W.Va. 381, 472 S.E.2d 827 (1996) (emphasis added). Notwithstanding the Circuit Court's apparent alarm that Goodyear's psychology degree might have enabled him to negotiate an unfair settlement with Kocher,[7] the fact

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[6] Similarly, neither of the other rules identified in Kocher's motion - Rule 11 (relating to the signing of pleadings) or Rule 16 (relating to scheduling) – provides any basis to sanction Oxford for Goodyear's conduct.

[7] *See* Order (11/8/02) at 13 (¶ 40).

is that he did not. Moreover, the prospect that any such settlement could have been enforced over the inevitable objections of Kocher's counsel is absolutely nil. In sum, Kocher was not and could not have been harmed by Goodyear's visit.[8]

The excessiveness of the sanction is illustrated by a comparison to *State ex ret. State Farm Fire & Casualty Co. v. Madden,* 192 W.Va. 155, 451 S.E.2d 721 (1994). In *Madden,* a lawyer's agent improperly (and under false pretenses) contacted a represented party directly, and the circuit court barred the agent from testifying as a sanction for this misconduct. This Court held that the sanction was too harsh and an abuse of the circuit's court's discretion. *Madden,* 451 S.E.2d at 729-730. Instead, the Court held that "a more appropriate sanction would simply ban references to any information obtained as a result of [the agent]'s unethical contact with [the represented party]." *Id.,* 451 S.E.2d at 730. Thus, even where a direct contact was truly impermissible, and even where the circuit court's sanction for that contact was far more modest than default judgment, this Court held that the sanction was too severe to be sustained.

Finally, the sanction cannot rest on any alternative ground. It is true enough that there were scheduling and discovery glitches and disputes in those hectic final weeks before trial - most of them attributable to Oxford's unforeseen, need to replace its counsel a second time — but even to the extent

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[8] Similarly, Ms. McIntyre's use of pretense to obtain directions - although in itself a regrettable act that Oxford will not defend - did Kocher no substantial harm.

that responsibility for these rested with Oxford, they were also clearly of a character that could have been remedied by modest monetary or evidentiary sanctions. *See Doulamis v. Alpine Lake Property Owners Ass'n, Inc.*, 184 W.Va. 107, 399 S.E.2d 689, 691 (1990) (per curiam) (Circuit court abused its discretion in dismissing case as sanction notwithstanding that the court has previously "abstained from dismissing the case for failure to prosecute at least twice, that [plaintiff] failed to meet the various discovery deadlines, including the last deadline, that the delay in discovery caused the trial date to be delayed at least twice, and that sanctions had already been imposed against [plaintiff]."); *Kamhi v. Waterview Towers Condominium Ass'n, Inc.*, 793 So.2d 1033 (Fla. App. 2001) (court abused its discretion in prohibiting defendant from presenting defense as sanction where failures to timely file exhibit and witness lists resulted from two changes of counsel on eve of trial).

Indeed, it warrants mention that monetary and evidentiary sanctions *were imposed* here - Oxford was ordered to pay the costs of an aborted deposition, and it was precluded from calling its expert witnesses. Of course, because these lesser sanctions were imposed *simultaneously with* and *in addition to,* rather than *before* and *in lieu of* the "ultimate" sanction, they render that sanction all the more excessive.

For these several reasons, the sanction of default judgment was an abuse of discretion and in violation of Oxford's right to due process of law under the state and federal constitutions. *See* syl. pt.

1, *Bartles* (recognizing that Art. III, § 10 of the West Virginia Constitution limits the power to impose sanctions); *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197, 209 (1958) (Rule 37 is subject to and limited by Due Process Clause).

C. A Court May Not Direct a
Verdict for Punitive Damages

The Circuit Court should not have entered default judgment as a sanction in the first place. But the Court went far further than simply imposing what – until now – has been viewed as the "ultimate" sanction. In addition, the Court invaded the exclusive province of the jury by giving it a verdict form that *directed* it to find that the factual predicate for punitive damages was present.[9] Although the form "asked" the jury twenty questions, eighteen of these had the answers already provided *by the Court.* Tr. at 945 (Court to jury: "I, as a matter of law, have ruled upon the other questions in this verdict form. You only have to complete two parts."). Among these questions answered by the Court were Nos. 16 through 19:

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[9] The Court had earlier deleted language from a proposed instruction that would have entrusted the necessary finding to the jury. In response to Oxford's objection, the Court stated that it had already made that decision. Tr. at 783-785. Moreover, the Court specifically ruled that the verdict form accurately reflected its rulings. Tr. at 825.

(16) Did Defendant Oxford Life Insurance Company act with actual malice?

Yes__X____
No_____

(17) Were Oxford Life Insurance Company's actions willful, wanton and intentional?

Yes__X____
No_____

(18) Were Oxford Life Insurance Company's actions reckless?

Yes__X____
No _____

(19) Were Oxford Life Insurance Company's actions done with reckless disregard to the civil rights of Charles Kocher?

Yes__X____
No_____

These questions (and answers) were obviously crafted to conclusively establish several of the factual bases for punitive damages established by this Court over a century ago in syllabus point 4 Of *Mayer v. Frobe,* 40 W.Va. 246, 22 S.E. 58 (1895). *See also* syl. pt. 3, *Alkire v. First Nat'l Bank of Parsons,* 197 W.Va. 122, 475 S.E,2d 122 (1996).[10] The verdict form, therefore, not only required the jury to find *a* factual predicate, but indeed *multiple* factual predicates, for punitive damages.

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[10] Question 19, however, errs in this regard by invoking Kocher's "civil rights," respect for which is the obligation of the government only.

No court can so require, because punitive damages may never be awarded as a matter of law. "It is ... reversible error ... to peremptorily charge the jury that they *shall* or *should* find exemplary damages, such damages being wholly within the discretion of the jury." Syl. pt. 7, *Greer v. Arrington,* 72 W.Va. 693, 79 S.E. 720 (1913) (emphasis by the Court); *see also id.,* 79 S.E. at 722 (such a charge is error "under any circumstances"); *accord, Billings v. The Charlotte Observer,* 150 N.C. 540, 64 S.E. 435, 437 (1909) (noting the "established principle that the court can never direct the award of punitive damages as a matter of law").

This rule is fully applicable even where judgment is entered as default. As this Court has previously held, notwithstanding entry of judgment by default, the defaulting party may at trial contest "the factual predicate for punitive damages[.]" *Coury v. Tsapis, 111* W.Va. 103, 304 S.E.2d 7, 15 (1983); *accord, Smith v. Sayles,* 637 S.W.2d 714, 719 (Mo.App. 1982); *American Central Corp. v. Stevens Van Lines, Inc.,* 103 Mich.App. 507, 303 N.W.2d 234, 237 (1981); *Gallegos v. Franklin,* 89 N.M. 118, 547 P.2d 1160, 1167 (1976) ("A punitive damages claim is not admitted by a default"). The punitive damages award at issue is therefore unconstitutional at its very root, because it does not rest on the essential findings *by the jury.*[11] *See* W.Va. Const, art. Ill, § 13.

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[11] The verdict form also prejudiced Oxford because it used the *Mayer v. Frobe* criteria arid terminology rather than the specific standard applicable to insurance disputes.

> By "actual malice" we mean that the [insurance] company actually knew that the

D. The Trial Teemed with Error

With the default judgment in place, Oxford was quickly subjected to a trial involving many matters that had nothing to do with Kocher's claim and in which its ability to defend itself was unfairly restricted.

i. Evidence of Post-Suit Events was Irrelevant and Prejudicial

Kocher's complaint was filed on July 15, 2000, and it was never amended or supplemented. Nonetheless, at trial he was permitted to introduce

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> policyholder's claim was proper, but willfully, maliciously and intentionally denied the claim.... Unless the policyholder is able to introduce evidence of intentional injury - not negligence, lack of judgment, incompetence, or bureaucratic confusion - the issue of punitive damages should not be submitted to the jury.

Hayseeds, Inc. v. State Farm Fire & Casualty Co., 177 W.Va. 323, 352 S.E.2d 73, 80-81 (1986). *See* syl. pt. 1 (in part), *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990) ("actual malice" standard sets a "nigh threshold" for punitive damages against an insurer); *McCormick v. Allstate Insurance Co.*, 202 W.Va. 535, 505 S.E.2d 454 (1998); *Berry v. Nationwide Mutual Fire Insurance Co.*, 181 W.Va. 168, 381 S.E.2d 367 (1989). To the extent that the insured's claim rests on delay in payment, a more specific showing must be made: "[T]he plaintiff must show that [the insurer] knew [plaintiffs] claim was proper and willfully, maliciously, and intentionally delayed payment *in order to* attempt to obtain a less than just settlement." *Poling v. Motorists Mutual Insurance Co.*, 192 W.Va. 46, 450 S.E.2d 635, 637-638 (1994) (emphasis added).

extensive evidence of events occurring *subsequent* to July 15, 2000.[12] Among others, these post-suit events included the Goodyear incident, the manner in which Oxford obtained documents from a third party, and alleged failures to supplement an interrogatory answer.

This evidence should not have been admitted. In *Palmer v. Farmers Insurance Exchange,* 261 Mont. 91, 861 P.2d 895 (1993), the Supreme Court of Montana explained the sound legal and policy reasons why an insurer's post-suit conduct should not generally be admitted as evidence of "bad faith." First of all, to the extent the conduct involves the defense of the suit itself, admitting such evidence unfairly impairs the insurer's right to defend itself.

> To permit evidence of insurers' litigation strategies and tactics is to impede insurers' access to the courts and right to defend, because it makes them reluctant to contest coverage of questionable claims. Free access to the courts is an important and valuable aspect of an effective system of jurisprudence, and a party possessing a colorable claim must be allowed to assert it without fear of suffering a penalty more severe than typically imposed on defeated parties. Public

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[12] The proper procedural vehicle for a plaintiff who wishes to rely on post-complaint transactions, occurrences, or events is a supplemental complaint under W.Va. R. Civ. P. 15(d). *See* syl. pt. 3, *Jones v. Jones,* 184 W.Va. 297, 400 S.E.2d 305 (1990).

> policy dictates, therefore, that courts must use extreme caution in deciding to admit such evidence even if it is relevant to the insurer's initial decision to deny the underlying claim.

Palmer, 861 P.2d at 915 (quotation and citation omitted). Second, and quite apart from these public policy concerns, events occurring after a complaint is filed are ordinarily not relevant to the claims pled.

> In general, an insurer's litigation tactics and strategy in defending a claim are not relevant to the insurer's decision to deny coverage. Indeed, if the insured must rely on evidence of the insurer's post-filing conduct to prove bad faith in denial of coverage, questions arise as to the validity of the insured's initial claim of bad faith.

Id. The Court further held that, even in those limited instances when post-suit conduct is marginally relevant because it casts light on the reasonableness of the denial of benefits or the insurer's pre-suit state of mind, a court exercising discretion under Rule 403 must recognize "the inherently high prejudicial effect of such evidence, keeping in mind the insurer's fundamental right to defend itself." *Id.* at 915; *accord, Timberlake Construction Co. v. U.S. Fidelity and Guaranty Co.,* 71 F.3d 335, 340-341 (10th Cir. 1995) (evidence of post-suit conduct should "rarely, if ever, be allowed to serve as proof of bad faith"); *Coleman v. Gulf Insurance Group,* 41 Cal.3d 782, 718 P.2d 77 (1986)

(allegedly frivolous appeal by insurer was subject to civil rule providing remedy for frivolous appeals generally, but did not constitute actionable violation of fair settlement practices provisions of state insurance code).

This Court previously cited and discussed *Palmer* without criticism, although the Court ultimately did not need to decide whether to follow it. *State ex rel. Federal Kemper Insurance Co. v. Zakaib,* 203 W.Va. 95, 506 S.E.2d 350, 352 n.3 (1998). Oxford respectfully submits that the Court should adopt the reasoning of *Palmer, Timberlake,* and *Coleman* in this case.[13]

Here, as in *Palmer,* the evidence presented to the jury "does not relate to the reasonableness of the original denial of the policyholder's claim, and

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[13] Citing *Palmer,* United States District Judge W. Craig Broadwater has held that there can be no cause of action for an insurer's breach of the covenant of good faith and fair dealing based on the insurer's taking certain legal positions in litigation with its insured, notwithstanding that those positions had proved wrong. *McDaniel v. Travelers Property Casualty,* 121 F.Supp.2d 508,512 (ND.W.Va. 2000).

Oxford readily acknowledges the Court's *dicta* in a footnote in *Honaker v. Mahon,* 210 W.Va. 53, 552 S.E.2d 788 (2001), where the Court observed that an insurer's duties of good faith and to refrain from unfair settlement practices are not delegable, and "insurance companies are therefore responsible for the actions of attorneys they employ." 552 S.E.2d at 797 n.8. But the *Palmer* court made similar observations. *See Palmer,* 861 P.2d at 913-914 (noting that insurer's duty to act fairly is a "continuing" duty that "does not end when an insured files a complaint"). Nevertheless, the court held that evidence of post-suit conduct should not generally be admissible to prove bad faith.

therefore, has little or no relevance." 861 P.2d at 916. This irrelevant evidence should not have been admitted.

ii. The Court Excluded Important Rebuttal Evidence and Erroneously Took Judicial Notice that the Evidence Had Been Obtained Improperly

Kocher testified, and his counsel argued, that Oxford subjected him to onerous and unnecessary paperwork. Tr. at 218 (Kocher testifies that Oxford asked him to sign "over five or six" continuous claim forms); *id.* at 221 (lady at Kocher's doctor's office complained about Oxford "continuously wanting these forms filled out"); *id.* at 95-96 (Kocher's opening statement: Oxford needed "forms almost every month" and Kocher "was pretty fed up with all the forms"). Kocher further testified that Centurion, a second credit disability insurer he had on another loan, was far less demanding. Tr. at 233 (Centurion only required him to fill out forms "once or twice"); *id.* at 240 (Oxford was "continuously wanting paperwork, when the other one [Centurion] accepted ... the first report that they got").

Kocher's recollection was faulty. He was asked to submit only *two* continuance claim forms to Oxford. Tr. at 366. In order to rebut Kocher's testimony, Oxford sought to introduce claims documents provided to it by Centurion. These documents would have shown that Centurion required many more forms than did Oxford. Tr. at 695-701 (proffering substance of documents). They would have both directly refuted Kocher's complaints about an Oxford paperwork deluge and, just as

importantly, could have undermined the jury's confidence in Kocher's memory.[14]

Despite several requests, however, the Circuit Court would not permit Oxford to introduce the Centurion documents. *See* Tr. at 261-263, 383-384, 695-701, 768-769. The court's rulings appear to have rested on Oxford's failure to list the documents as exhibits in its pretrial disclosures. *See id.*

The court erred. Where evidence is offered solely for rebuttal, pretrial identification is not essential to admissibility. *Hadox v. Martin,* 209 W.Va. 180, 544 S.E.2d 395, 402 (2001) (circuit court abused its discretion by excluding document offered in rebuttal on the ground that it was not listed as an exhibit during pretrial proceedings); *State v. Miller,* 195 W.Va. 656, 466 S.E.2d 507, 520-521 (1995) (circuit court properly allowed previously undisclosed witness to testify in rebuttal). Exclusion is particularly unfair where, as here, the party against whom the evidence is offered is fully aware of the evidence and cannot claim surprise. *Hadox,* 544 S.E.2d at 398-399; Tr. at 261 (Kocher's counsel:

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[14] The accuracy of Kocher's memory was of considerable importance. For example, Kocher testified that he initially called "Oxford" just after he was released from the hospital and spoke to a rude man, whose name he does not remember. This rude man apparently suggested that Kocher's injuries might have been intentionally self-inflicted. Tr. at 181. The attribution of this call to Oxford rests solely on Kocher's memory and credibility. Oxford's records show that, on August 2, 1999, Kocher called to ask whether Oxford would be paying the truck loan off; he spoke to Sandy Rowin, who is female. Pl. Exh. 1 at 56; Schafer Dep. at 62,78.

"Judge, the Centurion records, we have those exhibits.").[15]

Mere exclusion of these documents was error enough, but the error was then compounded. Oxford's counsel, Michael Bailey, had obtained the Centurion documents by sending a letter to a Ms. Nancy Lunn in Des Moines, Iowa, which letter enclosed a subpoena issued in the name of the Wetzel County Circuit Court. Pl. Exh. 13. Centurion then returned the documents described in the subpoena.

At Kocher's request, the Circuit Court *took judicial notice* in the presence of the jury that the subpoena was served improperly. Tr. at 579-581. Armed with this conclusive finding (and doubtless aware that the jurors could not look at the documents for themselves), Kocher's counsel then argued that Oxford had wrongfully obtained irrelevant "personal records" about Kocher. Tr. at 876. Thus, the Centurion documents not only failed to bolster Oxford's defense - as they should have - but also affirmatively worked to Oxford's detriment.

The Court erred. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be

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[15] The circuit court also questioned Oxford's ability to authenticate the Centurion documents. Tr. at 768. But as Oxford argued, Kocher himself could have been asked to identify them. Tr. at 700.

questioned." W.Va. R. Evid. 201(b). Courts may not take judicial notice of a fact that is "not a matter of common, everyday knowledge in the jurisdiction and [is] neither certain nor indisputable." *Mitchell* v. *Mitchell,* 176 W.Va. 36, 341 S.E.2d 411, 412-413 (1986) (per curiam). "'A judge may not take judicial notice of adjudicate facts that are open to reasonable dispute, even if the judge is personally convinced of the correctness of a particular conclusion.'" *In re State Public Building Asbestos Litigation,* 193 W.Va. 119, 454 S.E.2d 413, 422 (1994) (quoting Professor Cleckley).

Judicial notice was erroneous here because the circumstances surrounding Ms. Lunn's decision to comply with Mr. Bailey's request are completely unknown, let alone a "matter of common, everyday knowledge[.]" There is no rule of law that third parties must strenuously resist litigants' requests for relevant information. Because resistance is needlessly expensive and almost always futile in the end, many third parties waive strict adherence to procedure. The subpoena may simply have been something Ms. Lunn wanted for her file.[16]

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[16] In this regard, Oxford should point out that the decision to honor Oxford's request for documents was Centurion's alone. *United States v. Miller,* 425 U.S. 435 (1976) (customer could not challenge banks' compliance with allegedly invalid subpoenas for customer's checks and deposit slips); *United States* v. *Moffett,* 84 F.3d 1291 (10th Cir. 1996) (defendant could not challenge railroad's compliance with allegedly invalid subpoena for information on a train manifest); *People v. Warburton,* 7 Cal.App.3d 815, 86 Cal.Rptr. 894, 898-899 (1970) (defendant cannot assert alleged defects in subpoena that third party honored without objection); *cf. Securities and Exchange Comm'n v. Jerry T. O'Brien, Inc.,* 467 U.S. 735, 743

To the extent that the Circuit Court's decision to exclude the Centurion documents may also have rested on this view that the subpoena was improper (*see* Tr. at 261 (counsel urges exclusion on that basis)), the court would again have erred. "[T]he exclusionary rule is not usually extended to civil cases." *Madden,* 451 S.E.2d at 729. Moreover, "even under the exclusionary rule, evidence illegally obtained is admissible when used solely to impeach the defendant's testimony at trial." *Madden,* 451 S.E.2d at 729 n.10 (citing *Harris* v. *New York,* 401 U.S. 222 (1971)). Thus, "once [a party] chooses to testify and raises an issue that contradicts the illegally obtained evidence, the illegally obtained evidence may then be admitted for impeachment purposes only." *Id.* In short, even if judicial notice could properly have been taken that Oxford obtained the Centurion documents improperly - and it could not have been - the documents were plainly admissible to impeach Kocher's trial testimony.

iii. The Medical Board was Neither "Phony" Nor Relevant

Kocher contended throughout the trial that Oxford represented that it had a "medical board" and that the board was "phony." Tr. at 123-124, 332-334, 641-642, 665-672, 739-742, 828, 884, 942. From its prominent place at trial, one might expect that Oxford's medical board had figured into the

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(1984) ("It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.").

processing of Kocher's claim in some fashion. It did not. Oxford at no time relied on or referred to its "medical board" in its dealings with Kocher. Tr. at 666-667.

Nonetheless, Kocher was permitted to introduce two complaints to the West Virginia Insurance Commissioner from persons whose claims had been denied after review by Oxford's medical board. Pl. Exh. 27-28.[17] These persons were not plaintiffs, there was no evidence about the underlying validity or invalidity of their claims, and this case is not a class action. Kocher took up their cause anyway, insisting that the medical board was "phony" because it did not meet his definition of a "board."

Kathy Reyes, Oxford's Director of Operations, described what Oxford referred to as its "medical board" – a group of people, usually including a doctor, that reviewed certain claims that warranted a higher level of review. Tr. at 665-666, 672. Although it had no official members and did not perform "board"-like tasks such as passing resolutions or keeping minutes, it was none the less real. This review process was perhaps ill-named, and perhaps overly informal, but it was not "phony." More fundamentally, it was not *relevant*.

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[17] In addition, pleadings from four other lawsuits against Oxford were admitted over Oxford's objection. *See* Pl. Exh. 8-11; Tr. at 268-269, 576-577, 894. None of these suits involved a dismemberment claim, and no live witness testified as to the (irrelevant) facts underlying these other disputes. Yet the mere allegations of pleadings were spread before the jury. Their admission was error under W.Va. R. Evid. 402, 403, and/or 802.

iv. "Discrepancies" Between the Certificate and the "Bastard" Policy

Kocher assigned similar prominence to alleged "discrepancies" between his certificate of insurance and an allegedly "secret" or "bastard" group policy issued to the truck dealership. Tr. at 337-342, 477-488, 833-837. Again, one might expect from these emphatic denunciations that one of the alleged "discrepancies" had reared its head and worked to Kocher's disadvantage. Again, one would be wrong. Tr. at 533-534 (Plaintiff's expert Lane concedes that alleged discrepancies caused Kocher no problem).

As regards group credit life or disability insurance, there is nothing "secret" about the existence of separate contracts between the insurer and creditor on the one hand, and the insurer and debtor on the other. The separate contracts are a characteristic feature of such insurance. *See, e.g., Warden v. Bank of Mingo,* 176 W.Va. 60, 341 S.E.2d 679, 683 (1985) (describing similar group policy insuring creditor, with certificates of insurance issued to debtors); W.Va. Code § 33-14-3, -19 (authorizing group life insurance for debtor groups and requiring policyholder creditor to deliver certificates to insured debtors).

While the group policy and certificate should of course be consistent in the sense that they must work together, they are contracts with different entities and can differ for that reason alone. Tr. at 705. In any event, *Kocher's* contract with Oxford was confined to the certificate and attached application. "The Application upon which this certificate is

issued and this certificate are the entire agreement or contract between the Company and the Debtor. The terms of the Application and the Certificate cannot be altered, changed, waived or modified in any fashion by the general agent, dealer or financial institution." Pl. Exh. 1 at 46, ¶ 16. In this regard the certificate accurately stated the law. *Warden,* 341 S.E.2d at 682 (debtor's agreement to terms set forth on certificate of insurance created a contract on those terms).[18]

Moreover, even the hypothetical effect of these "discrepancies" was misstated or exaggerated. For example, Kocher expressed alarm that the group policy could be cancelled by either party on thirty days' notice. Tr. at 483-484; *id.* at 837 ("[T]he group policy allows the company to cancel it. Well, they didn't tell us about that. They could cancel it. It's a major difference."). But such a termination has no effect whatever on prepaid coverages already in place for individual debtors: "In the event of termination of the Policy for any reason, the insurance on all Debtors in force on the effective date of such notice will be continued for the period for which premium was paid by the Creditor/First Beneficiary to the Company," Pl. Exh. 25 at 2. Thus, as with the "medical board," Kocher was again permitted to complain of purely fictional harm from wholly irrelevant evidence.

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[18] Even if Kocher's certificate had been intended as a mere summary of coverage rather than as a complete and freestanding contract, the certificate would have controlled in the event that the underlying policy contained more restrictive terms. *See Romano* v. *New England Mutual Life Insurance Co.,* 178 W.Va. 523, 362 SE.2d 334, 338-339 (1987).

v. *The Appropriate Amount of Punitive Damages is not a Matter for Expert Testimony*

Daniel Selby testified as an expert that an award of $24.6 million would trigger an obligation that Oxford file a plan to restore its capital base, and that a $39.5 million hit would trigger an "overt investigation." Tr. at 448-450. This testimony was then used by Kocher as a basis to request that the jury award a specific amount of punitive damages. Tr. at 891, 943. This testimony and request were error.

> [T]he Court finds that there are no credentials that could qualify an individual as a punitive damages expert, primarily because the area of assessing punitive damages, implicative of various societal, policies and lacking any basis in economics, rests strictly within the province of the jury and, thus, does not necessitate the aid of expert testimony.
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> A juror might feel psychologically compelled to reconsider his/her intuitive reaction to a case and instead defer to the methods and calculations set forth by the expert with purportedly superior knowledge, finding him/herself torn and confused as to the correct method to apply and the amount of damages to award.

Voilas v. General Motors Corp., 73 F.Supp.2d 452, 464-465 (D.N.J. 1999). A Delaware court agrees. "[T]he Court should not permit expansion of the area of testimony to accept expert testimony by suggesting the minimum amount of award which would be required to accomplish the objectives of punitive damages. Plaintiffs have cited no authority supporting their position and the Court has found none." *Farrall v. A.C. & S. Co., Inc.*, 558 A.2d 1078, 1082 (Del.Super. 1989). These courts' fears are well-founded and well-grounded.

> It has been well documented that when making numerical estimates of goods or objects that are difficult to assess, people are strongly influenced by whatever numbers happen to be easily available, often regardless of their relevance. These numbers are referred to as "anchors." In the context of punitive damages, one of the few dollar figures available is that requested by the plaintiff: the amount of damages suggested by the plaintiffs counsel in closing arguments. The plaintiffs request has been shown to have a substantial influence on the amount awarded - the more you ask for the more you get.

D. A. Schkade, *Erratic by Design: A Task Analysis of Punitive Damages Assessment,* 39 Harv. J. on Legis. 121, 127-128 (2002); *see also* W. K. Viscusi, *The Challenge of Punitive Damages Mathematics,* 30 J. Legal Stud. 313, 316 (2001) (In experimental test of

proposed punitive damages jury instructions, instructions had little effect. "What mattered instead was the role of various anchoring effects based on, for example, suggested values for damages by the plaintiffs attorney.").

The *Voilas* and *Farrall* holdings are in accord with this Court's rule that references to specific dollar figures for noneconomic damages are generally improper. *See* syl. pt. 7, *Bennett v. 3 Coal Co.,* 180 W.Va. 665, 379 S.E.2d 388 (1989) ("The better practice in civil cases is to avoid mentioning to the jury the amount sued for, but such disclosure alone may not be reversible error. However, in a case involving only damages for mental distress, disclosure of such information may result in reversible error where the verdict is obviously influenced by such statement."); *Abdulla v. Pittsburgh and Weirton Bus Co.,* 158 W.Va. 592, 213 S.E.2d 810, 822-823 (1975).

This jury was obviously influenced by Selby's improper testimony. During its deliberations, the jury asked the Court, "What is the monetary value for [the] government to investigate Oxford?" Tr. at 947. Although the Court did not answer this question (Tr. at 949), the jury evidently recalled the testimony and awarded the $39 million requested.

vi. Appeals to Juror Passion and Bias

After the evidence – bloated with irrelevancies — was closed, the jury was then exhorted to look out for the home team. Counsel for Kocher argued:

> These folks that *come in here from Arizona* and change their testimony, change pages and pages, not once, many times, multiple times - they come in here, don't care and think they're going to pull the wool over a *West Virginia* jury's eyes. That's what they think.

Tr. at 849 (emphasis added). The remark was not an isolated or inadvertent one. Counsel later equated community loyalty to bravery: "They make up whatever it takes and hope West Virginians don't have the courage to take on a Phoenix, Arizona, corporation and make them be punished[.]" Tr. at 867. In his closing remarks, counsel mined this rich vein once more: "We know the jurors in West Virginia aren't going to let Arizona people come down here and lie to us on the stand and make a mockery of our judicial system." Tr. at 943.[19]

The problem of latent juror bias against outsiders is a well-recognized one that the courts have long struggled to mitigate. *See Garnes,* 413 S.E.2d at 906 ("[L]ocal juries and local courts naturally will favor local plaintiffs over out-of-state (often faceless, publicly held) corporations when awarding punitive damages."). Outright and overt *incitement* of this bias is patently improper. *See, e.g., Pappas v. Middle Earth Condominium Ass'n,* 963 F.2d 534, 539 (2nd Cir. 1992) ("There is no doubt

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[19] The appeal to hometown allegiance was not limited to Oxford itself, but was also extended to its counsel: "He's one of the best attorneys around. His firm is in Atlanta and he practices out of Charleston." Tr. at 856.

whatever that appeals to the regional bias of a jury are completely out of place in a federal courtroom."); *Westbrook v. General Tire and Rubber* Co., 754 F.2d 1233, 1238-1239 (5th Cir. 1985) (appeals to "community loyalty, duty and expectation ... serve no proper purpose and carry the potential of substantial injustice when invoked against outsiders"); *Stephen's Jewelry, Inc. v. Admiral Insurance Co.,* 63 Ohio App.3d 213, 578 N.E.2d 520, 523 (1989) (exhorting rural jury to disbelieve "highfalutin, big city lawyer from Cleveland" was improper argument); *Ryan v. State,* 457 So.2d 1084, 1088-1089 (Fla.App. 1984) (remarks pitting rural jurors against defendant from large city and referring to defendant's counsel "as a fancy attorney and out-of-towner" were improper appeals to bias, passion, and prejudice).

Improper argument took other forms as well. For example, counsel insinuated that Oxford's attorney was a slick talker who would set out to mislead the jury: "A lot of lawyers use analogies and stories, and things like that, and Mr. Hicks is one of the best. And I worry about whether or not - somebody that can talk that good, whether that's going to convince you and divert your attention from the facts. I worry about that." Tr. at 831-832.

Finally, counsel urged the jury to use its power to award punitive damages to accomplish an improper goal - the destruction of Oxford. *See, e.g.,* Tr. at 119 (Oxford "should [not] be in business at all" and "should be taken off the map"), 829-830 (verdict can "send a message" that Oxford "ought to be out of business you're so bad"), 840 (Oxford "is a bad, rogue company" and "should be put out of business"), 890

("put them out of business"). "The purpose of punitive damages is not to destroy the defendant[.]" *Chavez v. Keat,* 34 Cal.App.4th, 41 Cal.Rptr.2d 72, 75 (1995). Indeed, an award of punitive damages should "not exceed an amount that will accomplish society's goals of punishment and deterrence." *Garnes,* 413 S.E.2d at 904.

E. The Compensatory Damages Were Excessive

This array of errors, fueled by open appeals to passion and bias, led inevitably to an excessive verdict. Putting aside just for the moment the gigantic punitive damages award, Oxford first submits that the purported compensatory damages award was wildly excessive in a case that lacks bodily injury or other tangible harm. "The basic goal in awarding damages is to fairly and adequately compensate the plaintiff for the injuries and losses sustained." *Flannery v. United States,* 171 W.Va. 27, 297 S.E.2d 433, 435 (1982). The harm, if any, caused by Oxford's alleged lapses in processing and investigating Kocher's claims was economic, and its effects were largely remedied by the time suit was filed. Nonetheless, and readily granting that overdue bills can be annoying, Oxford submits that an award of $5,000,000 for "aggravation, annoyance, humiliation, and inconvenience" is excessive on the facts of this case.

A verdict should be set aside if it is "monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show[s] jury passion, partiality, prejudice or corruption." Syllabus (in part), *Addair v. Majestic*

Petroleum Co., Inc., 160 W.Va. 105, 232 S.E.2d 821 (1977). Aside from corruption, any of these grounds and formulations for setting aside a verdict should apply here. Indeed, as was shown above, the jury was affirmatively urged to bring its passion, partiality, and prejudice to bear.

A survey of awards for emotional and related injuries affirmed by this Court over the past decade further demonstrates just how far off the scale this $5 million judgment is. *See Foster v. Sakhai,* 210 W.Va. 716, 559 S.E.2d 53 (2001) (medical malpractice resulting in brain injury: $550,000 awarded for mental anguish, emotional distress, and loss of enjoyment of life); *Rodriguez v. Consolidation Coal Co.,* 206 W.Va. 317, 524 S.E.2d 672 (1999) (retaliatory discharge: $75,000 awarded for emotional distress); *Haynes v. Rhone-Poulenc,* 206 W.Va. 18, 521 S.E.2d 331 (1999) (disability discrimination: $21,000 for emotional distress, annoyance, etc.); *Richmond v. Ellenbogen,* 205 W.Va. 240, 517 S.E.2d 473 (1999) (sexual harassment/constructive discharge: $40,000 for emotional distress, humiliation, and degradation); *Kessel v. Leavitt,* 204 W.Va. 95, 511 S.E.2d 720 (1998) (fraud/tortious interference with parental relationship: $850,000 for past and future mental pain, suffering, anguish, and anxiety); *Frye v. Kanawha Stone Co.,* 202 W.Va. 467, 505 S.E.2d 206 (1998) (damage to property from blasting: $10,000 for annoyance and inconvenience); *Tudor v. Charleston Area Medical Center,* 203 W.Va. III, 506 S.E.2d 554 (1997) (constructive discharge/outrage: $500,000 for damage to reputation, emotional distress, and mental anguish); *Coleman v. Sopher,*

201 W.Va. 588, 499 S.E.2d 592 (1997) (wrongful removal of decedent's heart during autopsy: $135,000 for collective emotional distress of three survivors); *Vandevender v. Sheetz, Inc.*, 200 W.Va. 591, 490 S.E.2d 678 (1997) (retaliatory discharge: $170,000 for emotional distress, upset, embarrassment, and humiliation); *Dodrill v. Nationwide Mutual Insurance Co.*, 201 W.Va. 1, 491 S.E.2d 1 (1996) (unfair claims settlement practices: $2,000 for annoyance and inconvenience); *Page v. Columbia Natural Resources, Inc.*, 198 W.Va. 378, 480 S.E.2d 817 (1996) (wrongful discharge: $150,000 for emotional distress); *Reed* v. *Wimmer*, 195 W.Va. 199, 465 S.E.2d 199 (1995) (negligence/automobile accident: $19,000 for past and future pain, suffering, and emotional distress); *Tanner v. Rite Aid*, 194 W.Va. 643, 461 S.E.2d 149 (1995) (outrage: $12,000 apiece for emotional distress to two plaintiffs); *Estep v. Brewer*, 192 W.Va. 511, 453 S.E.2d 345 (1994) (defamation: $150,000 for emotional distress); *Mackey v. Irisari*, 191 W.Va. 355, 445 S.E.2d 742 (1994) (medical malpractice/wrongful death: $1,000,000 for grief, etc., split among five survivors); *Dobson v. Eastern Associated Coal Corp.*, 188 W.Va. 17, 422 S.E.2d 494 (1992) (age discrimination: $125,000 for emotional distress); *Mace v. Charleston Area Medical Center*, 188 W.Va. 57, 422 S.E.2d 624 (1992) (wrongful discharge: $50,000 for emotional distress); *Slack* v. *Kanawha County Housing & Redevelopment Auth.*, 188 W.Va. 144, 423 S.E.2d 547 (1992) (invasion of privacy: $12,000 for emotional distress and $18,000 for "mental anxiety").

This Court has even held that a $10,000,000 award for the *wrongful death* of a *small child* is

excessive. *See Roberts v. Stevens Clinic Hospital, Inc.*, 176 W.Va. 492, 345 S.E.2d 791, 800-801 (1986) (ordering a *remittitur* to $3,000,000). Annoyance at filling out a couple of forms and temporary worry about a debt cannot be meaningfully (or even tastefully) equated to the grief of the parents in *Roberts*.

Their gross excessiveness suggests that these "compensatory" damages are not compensatory at all; they are instead punitive damages in the very thinnest of disguises. This Court has recognized the "openendedness" of damages for emotional distress, and that large awards of such damages may overlap with and improperly duplicate punitive damages. *See* syl. pt. 5, *Harless v. First National Bank*, 169 W.Va. 673, 289 S.E.2d 692 (1982). The overlap has a long pedigree, "Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." *Cooper Industries*, 532 U.S. at 437 n.11.

Indeed, as regards the tort of outrage (or "intentional infliction of emotional distress"), this Court *presumes* that compensatory and punitive damages are duplicative unless the plaintiff comes forth with proof of a "serious physical or mental condition requiring medical treatment, psychiatric treatment, counseling or the like[.]" Syl. pt. 14, *Tudor v. Charleston Area Medical Center, Inc.*, 203 W.Va. 111, 506 S.E.2d 554 (1997); *see id.*, 506 S.E.2d at 575 (requiring evidence of "some quantifiable measure of compensatory damages sustained from

the intentional infliction of emotional distress so that it is clear that those damages are not duplicative punitive damages").

The *Tudor* presumption is not strictly applicable here. Syl. pt. 1, *Sheetz, Inc. v. Bowles Rice McDarin Graff & Love, PLLC,* 209 W.Va. 318, 547 S.E.2d 256 (2001) (limiting the "specific principles" of *Tudor* to "the tort of the intentional or reckless infliction of emotional distress"). Nevertheless, the lack of a presumption of duplicative damages is no reason for the Court to turn a blind eye to obviously duplicative damages. Kocher asked for approximately $39 million in punitive damages (Tr. at 891, 943), and this Court should conclude that the jury gave him what he asked for.

F. Oxford did not have Fair Notice of the Potential Penalty, in Violation of its Substantive Right to Due Process

Due process imposes a substantive limit on the State of West Virginia's power to punish.

> Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States.

> The Due Process Clause of its own force also prohibits the States from imposing "grossly excessive" punishments on tortfeasors[.]

Cooper Industries, 532 U.S. at 433-434 (citations omitted).

A fundamental restraint on the power to punish is fair advance notice of the potential punishment:

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of *the severity of the penalty* that a State may impose.

BMW of North America, Inc. v. Gore, 517 U.S. 559, 574 (1996) *("Gore")* (emphasis added). This "fair notice" requirement must be applied evenhandedly. The Court emphasized that "[t]he fact that [a litigant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." *Gore,* 517 U.S. at 585.

Gore's holding - however "elementary" its footing – was a groundbreaking one. *Gore* "is the first case in modern times in which the Supreme Court has found a punitive damages award to be so excessive that it violates the *substantive* component

of the Due Process Clause." *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 636 (10th Cir. 1996) (emphasis added). Until that time, the Court's efforts to rein in punitive damages had involved only *procedural* safeguards, and most courts had assumed that a punitive damages award made at a fair trial and subjected to proper review was unassailable. *See BMW of North America, Inc.* v. *Gore*, 701 So.2d 507,510 (Ala. 1997) (on remand).

The *Gore* Court established three "guideposts" for substantive due process review of punitive damages awards: the degree of reprehensibility of the conduct; the disparity between the award and the harm or potential harm suffered; and the difference between the award and the civil penalties authorized or imposed in similar cases. 517 U.S. at 575. Application of *Gore* has led to the reduction of punitive damages awards against insurers on facts more egregious and awards more modest than those at issue here. *See, e.g., Union Security Life Insurance Co. v. Crocker*, 709 So.2d 1118, 1123 (Ala. 1997) (notwithstanding that credit life insurer's misconduct was "highly reprehensible," $2 million award of punitive damages, which represented 8.2% of company's net worth and 13% of its unassigned surplus, was excessive under *Gore* guideposts); *American Pioneer Life Insurance Co. v. Curtis*, 704 So.2d 1361, 1366 (Ala. 1997) (amount of punitive damages should not "prevent [the defendant insurer] from meeting its obligations to its insureds"; $2 million award, or 28% of insurer's cash reserves, was constitutionally excessive).

The unparalleled size of this punitive damages award should prove the lack of the constitutionally required notice on its face. Certainly no prior punitive damages award sustained by this Court against an insurer would even hint that an eight-figure award was conceivable. *See Dodrill,* 491 S.E.2d 1 (affirming $5,000 punitive damages award); *Jarvis v. Modem Woodmen of America,* 185 W.Va. 305, 406 S.E.2d 736 (1991) (per curiam) ($500,000); *Berry,* 381 S.E.2d 367 ($500,000); *Bell* v. *Inland Mutual Insurance Co.,* 175 W.Va. 165, 332 S.E.2d 127 (1985) ($25,000 as regards one insurer and $300,000 as to another); *Mutafis v. Erie Insurance Exchange, 11A* W.Va. 660, 328 S.E.2d 675 (1985) ($20,000).

Application of the *Gore* guideposts confirms the lack of fair notice of such draconian punishment. The first of these guideposts is the reprehensibility of the conduct to be punished. At best, Kocher's relevant evidence showed that Oxford should have conducted a more vigorous and timely investigation of his circumstances upon learning of his injury, and that it should have been cognizant of West Virginia law so requiring. These mistakes are not "reprehensible" in the sense that they call for an immense award of punitive damages. *Vandevander,* 490 S.E.2d at 691 ("bad or legally incorrect corporate policy is not the equivalent of a mean-spirited, evil intent to cause harm"). Although Kocher suffered a bodily injury in his farm accident, Oxford did not inflict it. The failure to promptly pay an insurance claim inflicts economic injury, and misconduct causing economic injury is less likely to be reprehensible. *Gore,* 517 U.S. at 577; *Continental*

Trend Resources, 101 F.3d at 642 (even "egregious" economic harm is "less worthy of punishment than harm to health and safety"). Finally, there was no evidence that similar conduct by Oxford had ever been held to be unlawful before. *See Gore,* 517 U.S. at 579 (deeming it "significant" on the question of reprehensibility that there was no evidence that the defendant "persisted in a course of conduct after it had been adjudged unlawful on even one occasion").

Next, *Gore* teaches that courts should assess the relationship between the punitive damages and the actual or potential harm to the plaintiff. We can know for certain what the potential concrete harm was to Kocher. If Oxford had simply breached its contract in the most basic of fashions — by flatly refusing to pay - Kocher would have lost the policy benefit to which he was entitled: $11,322.30. The punitive damages assessed in this case exceed this potential harm by over 3,000 times (and even more if the obviously punitive component of the "compensatory" damages is included).

"To find a 'reasonable relationship' between purely economic harm totaling $56,000, without significant evidence of future repetition, and a punitive award of $2 million is to empty the 'reasonable relationship' test of meaningful content." *Gore,* 517 U.S. at 590 (Breyer, J., concurring). Here, the economic harm is far less and the punishment far greater.

The third and final *Gore* guidepost is a comparison with the civil or criminal penalties that could be imposed for comparable misconduct.

Because, it represents a considered societal judgment of the appropriate sanction for a given offense, the penalty prescribed by the legislature for the same or similar misconduct is a particularly useful and relevant criterion in the proportionality analysis. *Gore,* 517 U.S. at 583; *see United States v. Bajakajian,* 524 U.S. 321, 336 (1998) ("judgments about the appropriate punishment for an offense belong in the first instance to the legislature").

In West Virginia, violations of Article 11 of the insurance code, including unfair claims settlement practices under § 33-11-4(9), are punishable by a civil penalty of $1,000 per violation, with an aggregate maximum of $10,000. W.Va. Code § 33-1 l-6(a). Where the insurer knew or should have known that its conduct was in violation of the article, these penalties are increased fivefold. *Id.* Thus, if Oxford had knowingly engaged in ten or more unfair claims settlement practices, the maximum civil penalty to which it could have been subjected was $50,000. Even if one ignores the obviously punitive nature of Kocher's "compensatory" damages, the punitive damages award in this case is *680 times* greater than this maximum civil penalty. *Cf. Bajakajian,* 524 U.S. at 338-340 (civil forfeiture of $357,144 - over 71 times the corresponding criminal fine — was "grossly disproportional" to the offense in violation of the Eighth Amendment's Excessive Fines Clause).

As to this third factor, *Gore* could scarcely be more on point:

> The maximum civil penalty authorized by the Alabama Legislature

> for a violation of its Deceptive Trade Practices Act is $2,000; other States authorize more severe sanctions, with the maxima ranging from $5,000 to $10,000. Significantly, some states draw a distinction between first offenders and recidivists; thus, in New York the penalty is $50 for a first offense and $250 for subsequent offenses. *None of these statutes would provide an out-of-state distributor with fair notice that the first violation - or, indeed the first 14 violations - of its provisions might subject an offender to a multimillion dollar penalty.* Moreover, at the time BMW's policy was first challenged, there does not appear to have been any judicial decision in Alabama or elsewhere indicating that application of that policy might give rise to such severe punishment.

Gore, 517 U.S. at 584 (emphasis added; footnotes omitted). In short, all three *Gore* guideposts lead to the same conclusion: this award violates Oxford's substantive right to due process of law.

G. West Virginia's Interest in
Punishment Ends at Its Borders

The *Gore* Court also repeatedly stressed that punitive damages must further the interests — and *only* the interests — of the state imposing them. "[T]he federal excessiveness inquiry appropriately begins with an identification of the *state* interests

that a punitive award is designed to serve." *Gore*, 517 U.S. at 568 (emphasis added). "[N]o single State ... [may] impose its own policy choice on neighboring States." *Id* at 571. "[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572. "While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation." *Id.* at 585. Thus, even if it were proper for a Wetzel County jury to try to drive Oxford out of West Virginia rather than merely to deter it from similar acts in the future, it would be constitutionally impermissible for that jury to try to drive it out of business elsewhere.

Kocher's many appeals to the jury to put Oxford "out of business" necessarily run afoul of this constitutional limit — it is not up to West Virginia whether or how Oxford does business in other states. In addition, Kocher made direct appeals that the jury impose its will on the whole nation. "Make them change so they don't do this to the other folks in Warrior, West Virginia; Williamson, West Virginia; Wetzel County, West Virginia; any place in West Virginia *or throughout this country* anymore." Tr. At 890 (emphasis added); *see id.* at 943 (urging jury to send message "loud enough" that "everybody in this country is going to know it"). A jury applying state law may not speak that loudly. *See White v. Ford Motor Co.*, 312 F.3d 998, 1015 (9th Cir. 2002) (reversing punitive damages award in case arising under Nevada law where plaintiffs lawyer had implored the jury to make its award "loud enough" to

vindicate the rights of Ford truck owners nationwide).

H. The Punitive Damages Award Violated Oxford's Right to Procedural Due Process

Thus, however adequate the procedure that generated it, the Due Process Clause would not permit the freakish result that is now embodied in the final judgment of the Circuit Court of Wetzel County. But the procedure that generated this freakish result was most inadequate, as Oxford will now demonstrate.

"Punitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co.*, 512 U.S. at 432. For this reason, punitive damages warrant special procedural protections. The safeguards required by this Court were announced in *Garnes.*[20] They have three elements - jury instructions, review by the trial court, and appellate review by this Court. The first two of these safeguards have failed.

The necessary instructions were described in Syllabus Point 3 of *Garnes:*

> When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding

---

[20] These procedures are modeled over those approved by the United States Supreme Court in *Pacific Mutual Life Insurance Co. v. Hastip,* 499 U.S. 1 (1991).

punitive damages. These factors are as follows:

(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

(2) The jury should consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for actual harm caused once his liability became clear to him.

> (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
>
> (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.
>
> (5) The financial position of the defendant is relevant.

The jury-instruction safeguard was rendered utterly impotent here. Although a *Garnes* instruction was given,[21] the Court's verdict form improperly and conclusively instructed the jury that several elements critical to the proper analysis were established as a matter of law. In this light, the jury did not play and could not have played its intended procedural role. If anything, the verdict form caused the jury to be inflamed rather than properly guided. Thus, the error described in § VI-C above also amounts in substance to a procedural due process violation.

Similarly, adequate judicial review of the amount of a punitive damages award is also required by the Fourteenth Amendment's Due Process Clause. *Honda Motor Co.*, 512 U.S. at 432-435. This

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[21] *See* Plaintiffs Instruction No. 24. For what it is worth, this instruction misstated the fifth *Garnes* factor, substituting "financial assets" for "financial position."

judicial review safeguard is intended to operate as a *constraint* on punitive damages awards. *Garnes,* 413 S.E.2d at 904 (judicial review 'insures that awards do not exceed an amount that will accomplish society's goals of punishment and deterrence"). Syllabus Point 4 of *Garnes* describes the minimum required judicial review:

> When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:
>
> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;
>
> (3) Any other civil actions against the same defendant based on the same conduct; and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlement when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.
>
> Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require

> downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

The Circuit Court's failure to discern, upon its *Garnes* review, the clear *substantive* due process violation described above at least suggests that its review was something less than *procedurally* adequate. Oxford submits that the Circuit Court, like the Alabama Supreme Court in the ruling reversed in *Gore,* used the *Garnes* factors not to constrain but to enhance. *See Gore,* 517 U.S. at 589 (Breyer, J., concurring) ("[T]he Alabama courts, in this case, have applied the 'factors' intended to constrain punitive damages awards in a way that belies that purpose.").

The first *Garnes* factor is the harm caused or likely to be caused by the conduct. In a given instance, breach of a contract to pay a modest amount of money causes a modest amount of economic harm. The Circuit Court misapplied this factor. Said the Court: "It is clear that this company had no policy to handle dismemberment claims or to investigate them, and therefore *the harm to others* is potentially great." Order (11/8/02) at [48] (emphasis added); *see id.* at [49] (citing the "harm to Charlie

Kocher, *together with* other West Virginians and any one that would purchase this product") (emphasis added). The required proportionality is to the actual or potential harm *to Kocher,* and not to the aggregate harm of "others." *Continental Trend Resources,* 101 F.3d at 639-640 (although actual and potential harm may be considered "it must be harm to these plaintiffs, not to others").[22]

The second factor – reprehensibility – was discussed above. Oxford's conduct did not result in harm to health or safety, and there was no evidence that Oxford ignored or flouted a prior determination that its conduct was unlawful.

Third, Oxford did not profit from any mishandling of Kocher's claim. Before the complaint was even filed, Oxford had paid out much more than Kocher's premium. Indeed, Oxford's *potential* profit had it absolutely stonewalled Kocher from day one was only $732.56.

Fourth, there is no "reasonable relationship" between compensatory and punitive damages here. The Circuit Court's holding that the ratio is "less than seven to one"[23] assumes both that the $5,000,000 in "compensatory" damages is not itself excessive and that no part of it constitutes additional

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[22] Moreover, the Circuit Court did not *hazard to* guess how many "others" there are or specify whether this group is limited to West Virginians. Such an amorphous concept of collective "potential" harm could not possibly serve its intended role as a meaningful constraint on punitive damages.

[23] Order (11/8/02) at [48].

punitive damages. As Oxford showed above, both of these assumptions are faulty. Moreover, given the "openended" nature of emotional damages that the Court has long recognized, Oxford believes - and urges the Court to rule - that, absent proof like that described in Syllabus Point 14 of *Tudor,* such damages should be included with the punitive damages, or at least disregarded, in computing the compensatory/punitive ratio. Any other rule saps the "reasonable relationship" inquiry of meaning by permitting it to turn on arbitrary line-drawing between two (already overlapping) categories of noneconomic damages.

"The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1." Syl. pt. 15 (in part), *TX0 Production Corp. v. Alliance Resources Corp.,* 187 W.Va. 457, 419 S.E.2d 870 (1992), *overruled in part on other grounds,* syl. pt. 6, *Alkire,* 475 S.E.2d 122. The ratio of punitive damages to the tangible harm to Kocher is astronomical.

Finally, under the fifth *Garnes* jury factor, "the financial position of the defendant is relevant." This factor is not, however, a license to *enhance* an award. When the constitutional limit defined by "fair notice" is reached, it is reached for any and all defendants. The defendant's "ability to pay a large award should not ... result in the affirmance of an unjustified award simply because the defendant has

the ability to pay it." *American Pioneer life,* 704 So.2d at 1366 (quotation omitted).

The additional factors to be considered by the court under Syllabus Point 4 of *Garnes* further demonstrate the excessiveness of the award.[24] This litigation was not especially protracted or unduly expensive. Oxford has not been criminally prosecuted for its handling of Kocher's claim, and there are no other civil actions against it based on the same conduct. Finally, this immense award of punitive damages is not necessary to encourage fair and reasonable settlement of a claim arising out of a clear wrong. Oxford believed - and indeed still believes — that it had defensible grounds for initially denying Kocher's dismemberment claim, and that its request for a second CCF to substantiate continued disability was not unreasonable. In addition, Oxford made fair and reasonable offers of settlement early in and throughout this litigation.

---

[24] In violation of Syllabus Point 4, the Circuit Court considered only one of these required factors. If misapplied that one. According to the Court, it "does not appear" that the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once the liability became clear. *No such evidence was introduced at trial."* Order (11/8/02) at [49] (emphasis added). Of course no evidence on settlement offers was introduced at trial. The whole purpose of the Syllabus Point 4 factors is to enable the court to consider relevant information that the jury ordinarily *does not* hear, but that is nonetheless relevant to the propriety of the award. In this regard, information concerning Oxford's settlement offers was submitted for the Court's use as a part of Oxford's post-trial motion. New Trial Motion Exh. A at 176, Exh, G, and Exh. H.

I. Cumulative Error Warrants Reversal

The errors in this case are stark and substantial, and the judgment can and should fall on any one of them. Nonetheless, Oxford submits that the many errors in this case have also worked a cumulative injustice and, to the extent that it may be necessary, Oxford relies on the doctrine of cumulative error.

VII. Conclusion

Oxford presents this petition seeking the basic protection of the rule of law to which everyone - whether rich or poor, virtuous or villainous - is entitled. All persons are entitled to notice of how to conform their conduct to the law, and to notice of the consequences of failing to do so. Oxford had no notice – let alone "fair" notice – that it risked being bludgeoned with the extreme punishment that the Circuit Court and jury have imposed. Punishment without notice is not law, but lawlessness:

> Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.

Gore, 517 U.S. at 587 (Breyer, J., concurring).

The judgment of the Circuit Court of Wetzel County embodies and is a product of the breakdown of the rule of law, and that judgment must not be allowed to stand. Oxford's petition should be granted, and, upon this Court's full review, the final judgment of the Circuit Court of Wetzel County should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas R. Goodwin, certify that service of the foregoing "Petition for Appeal" was made this 28th day of February, 2003, by Federal Express overnight delivery and by placing a true and correct copy thereof in the United States Mail, postage prepaid, and addressed as follows:

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/s/
THOMAS R. GOODWIN

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 29th of October, 2003, the following order was made and entered:

Daniel R. Fitch, and Adam Plumley, co-administrators of the Estates of Harley Fitch and Tyler Fitch, deceased, and Daniel Fitch, individually, Plaintiffs Below, Respondents

vs.) No. 031470

Mountain Enterprises, Inc., d/b/a Lenore Asphalt, Inc., a Kentucky corporation, Jerry Galloway, individually and d/b/a Galloway's Trucking, and Billy D. Kirk, Defendants Below,

Mountain Enterprises, Inc., Petitioner

On a former day, to-wit, July 14, 2003, came the petitioner, Mountain Enterprises, Inc., by A.L. Emch and Gretchen M. Callas, Jackson Kelly, its attorney, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Lincoln County, rendered on the 21st day of October, 2003, with the record accompanying the petition. Thereafter, on the 24th day of July, 2003, came the respondents, Daniel R. Fitch and Gregory Adam Plumley, by H. Truman Chafin and Letitia

Neese Chafin, The H. Truman Chafin Law Firm, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

A True Copy

Attest: /s/ Rory L. Perry, II
Clerk, Supreme Court of Appeals

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DANIEL R. FITCH and GREGORY ADAM PLUMLEY, Co-Administrators of the Estates of Tyler Fitch and Harley Fitch, deceased, and DANIEL R. FITCH, Individually,

Plaintiffs/Respondents,

v. APPEAL NO._____
Civil Action No. 99-C-86
Circuit Court of Lincoln County

MOUNTAIN ENTERPRISES, INC.,

Defendant/Petitioner.

PETITION FOR APPEAL ON BEHALF OF MOUNTAIN ENTERPRISES, INC.

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June 23, 2003

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INTRODUCTION

This case combines an unbearably tragic accident and multiple, compounding errors by the Circuit Court to produce a result that your Petitioner, Mountain Enterprises, Inc. ("Mountain") respectfully submits is clearly wrong and must be overturned. A freak accident occurred because of a bald tire on a truck owned and operated by an independent contractor used by Mountain. A mother and her two children were killed. The independent contractor and its driver were clearly responsible for this accident – but their assets were limited. Could Mountain be blamed? It is undisputed that Mountain had no actual knowledge that the tire was bald. It is further undisputed that the independent contractor had an absolutely spotless prior record – no accidents, no violations, no citations, no problems. Exemplary. The only liability-supporting "conduct" of which Mountain is accused is that it failed to inspect the truck involved (an inspection that neither case law, statute, regulation, nor industry standard required, suggested, or implied should be done), which it may be speculated would have resulted in finding the bald tire, which it may further be speculated would have allowed Mountain to preclude the truck from being operated unless the tire was replaced. What to do? Upon these facts and speculations was built a tale of vicarious liability gone wild. In the course of this litigation, the Circuit Court birthed from a contract with the State of West Virginia a new, unprecedented, and legally unsupported duty that it then retroactively imposed upon Mountain. To seal the package, the Circuit Court later refused to permit testimony by the

Department of Highways witness who would have verified that indeed the contract was not intended to create any such duty. Thereafter, through a confusing verdict form, tortured reasoning, disregard of undisputed evidence, unwarranted and baseless assumptions, and an inadequate and poorly supported *Garnes v. Fleming Landfill, Inc.* analysis, a case perhaps sustaining at most a finding of simple negligence on the part of Mountain was transformed into one imposing liability against it not only for compensatory damages of $6 million, but also for an identical amount of punitive damages ($6 million) two different times for precisely the same conduct. Twelve million dollars in punitive damages for failing to inspect a truck that had a bald tire, of which it is undisputed Mountain had no actual prior knowledge, that was owned, maintained, and operated by an independent contractor with a spotless prior record. A total of $ 18 million for breach of a court-created duty that Mountain could not have known it had.

From a human perspective, the results of this accident are sad beyond measure, but the Petitioner's culpable "conduct" (and there really wasn't any) that brought it about is at most a matter of simple negligence, even when judged under the Circuit Court's new standard. The imposition of any liability on Mountain in this case, particularly liability for punitive damages, and most especially a double recovery of punitive damages, violate the United States and West Virginia Constitutions as applied through the decisions of this Honorable Court and the United States Supreme Court, and must be set aside. Mountain

respectfully asks that this Court accept this Petition so that it may do so.

STATEMENT OF PROCEEDING AND NATURE OF RULINGS BELOW

Mountain assigns as error a number of Orders by the Honorable Jay Hoke of the Circuit Court of Lincoln County, West Virginia, before and during the trial of this case, as well as in ruling on Mountain's post-trial motions. This civil action was tried before a jury in Lincoln County for sixteen days over a six-week period, culminating on June 28, 2001 with a verdict in favor of the plaintiffs and against the defendants. After reviewing the punitive damages pursuant to *Garnes* v. *Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), the Circuit Court sustained the award in full and entered judgment on February 1, 2002 against the defendants on its interpretation of the jury's verdict (the meaning of the verdict was disputed), Mountain filed a Combined Motion For Judgment As A Matter Of Law On Compensatory And Punitive Damages And, In the Alternative, For A New Trial On Compensatory And Punitive Damages, which the Circuit Court denied by Order dated October 21, 2002.

Availability of the Independent Contractor Defense. In the first Order challenged by Mountain, the Circuit Court held that Mountain was precluded from asserting the independent contractor defense to vicarious liability for the acts of the trucking company and driver that were directly involved in the accident. The Circuit Court reasoned that each

of three supposed exceptions to the independent contractor defense applied: (1) Mountain was performing inherently dangerous work; (2) Mountain was performing work requiring a franchise from a public authority and involving an unreasonable risk of harm to others; and (3) Mountain's contract with the State imposed upon Mountain a non-delegable duty to protect the safety of the public. In the course of reaching this ruling, the Circuit Court held that the contract between the West Virginia DOH and Mountain unambiguously imposed upon Mountain a duty to protect public safety not only at the job site (a section of West Virginia Route 10 that Mountain was to re-pave with asphalt), but also between Mountain's asphalt plant and the job site. *See* Order On Declaratory Judgment And Summary Judgment Dated October 26, 2001.

Sufficiency of Evidence to Support Punitive Liability. In the second Order challenged by Mountain (as supplemented by a subsequent oral ruling during the colloquy on the jury instructions), the Circuit Court held that plaintiffs had presented sufficient evidence to warrant submission of the issue of punitive damages to the jury. *See* Memorandum Order On Punitive Damages dated June 7, 2001; 6/27/01 Trial Tr. at p. 6. The Circuit Court concluded that there were two alternative bases upon which a reasonable jury could award punitive damages against Mountain. First, the jury could find that Mountain expressly or impliedly authorized or ratified the tortious conduct of the truck driver, Kirk, and his employer, Galloway. Second, the jury could find that Mountain itself

engaged in acts or omissions warranting punitive damages.

Admissibility of Testimony by State DOH Official Regarding the Meaning of the Contract. In the third Order challenged by Mountain, the Circuit Court orally ruled, based upon its pre-trial holding that the Mountain-DOH contract unambiguously imposed upon Mountain a duty to protect public safety both on and off the job site, that Robert Tinney, the official who signed the Mountain-DOH contract on behalf of DOH, could not testify as to the meaning of the contract. *See* 6/15/01 Trial Tr. at p. 14. Tinney had testified in his deposition that the contract was not understood by the parties to, and did ***not,*** impose upon Mountain a duty to protect public safety outside of the job site. *See* 6/6/01 Trial Tr. at pp. 132-34 (quoting deposition).

Excessiveness of Punitive Damages and Meaning of Ambiguous Verdict. In the fourth Order challenged by Mountain, the Circuit Court reviewed the punitive damages award against Mountain for excessiveness pursuant to *Garnes* and held that the award should be sustained in full. In so ruling, the Circuit Court also rejected Mountain's related challenges to the punitive damages award: (1) that the verdict form's ambiguity concerning whether the jury intended to award $6 million or $ 12 million in punitive damages against Mountain should be construed in Mountain's favor under the rule of lenity; and (2) that if the verdict form were construed to award $12 million in punitive damages against Mountain, such award would constitute an impermissible double recovery because it would

punish Mountain twice for the same conduct. *See* Opinion Order On Review Of Punitive Damages dated December 21, 2001.

Denial of Post-Trial Motions. In the fifth Order challenged by Mountain, the Circuit Court denied Mountain's post-judgment motion, rejecting Mountain's contentions, *inter alia,* that Mountain was entitled to judgment as a matter of law on punitive damages, that Mountain was entitled to a new trial because the court had erred in precluding the independent contractor defense, and that Mountain was entitled to a new trial because the jury's verdict was against the clear weight of the evidence. *See* Order Denying Motions For New Trial And Granting Certain Other Relief dated October 21, 2002.

STATEMENT OF FACTS

On April 23, 1999, on Route 10 just north of West Hamlin, an asphalt-carrying truck owned by defendant Jerry Galloway and driven by defendant Billy Kirk collided with an oncoming Lincoln Town Car, killing the Town Car's driver, Leigh Poindexter, and her two children, Tyler and Harley Fitch. *E.g.,* 5/31/01Trial Tr. at pp. 90,97,98,102,107. The trucking company had been contracted by Mountain to transport asphalt from Mounlain's asphalt plant to a portion of highway in Lincoln County that Mountain was paving pursuant to a contract with the State. *E.g.,* 6/19/01 Trial Tr. at pp. 102,105.

The cause of the accident was basically undisputed. The truck's left front tire was badly

worn and blew out, *e.g.*, 6/6/01 Trial Tr. at p. 49, causing the truck to swerve over the center-line of the road, *e.g., id.* at pp. 81-82, and collide with, tip over, and land on top of Poindexter's Lincoln Town Car, *e.g., id.* at p. 84. While the liability of Galloway and Kirk was not disputed, Mountain's responsibility for the truck's condition — and the ultimate legal question of Mountain's liability for the victims' deaths — was. The facts relevant to that question are discussed at appropriate points below.

The representatives of the minor victims brought suit against Kirk, Galloway, and Mountain in the Circuit Court of Lincoln County.[1] On June 28,2001, after a trial of several weeks, the jury rendered a verdict in favor of plaintiffs and against all defendants. The jury awarded approximately $6,000,000 in compensatory damages jointly and severally against the three defendants. The jury assessed punitive damages against Kirk in the amount of $10,000. The punitive damages verdicts against Galloway and Mountain were less clear (as we discuss in more detail below). Regarding Galloway, the jury entered $50,000 on each of the verdict form's two lines for punitive damages. Regarding Mountain, the jury entered $6,000,000 on each of the verdict form's two lines for punitive damages. See Exhibit A (Verdict Form).

The Circuit Court reviewed the punitive damages award under *Garnes* but refused to remit

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[1] The Estate of the deceased driver of the Lincoln Town Car, Leigh Poindexter, brought a separate action against the same three defendants, which was settled. Under the settlement, Mountain paid $ 1,700,000 to Poindexter's Estate.

the award, and denied Mountain's Combined Motion For Judgment As A Matter Of Law On Compensatory And Punitive Damages And, In The Alternative, For A New Trial On Compensatory And Punitive Damages. Mountain now petitions for appeal.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in denying Mountain's motion for judgment as a matter of law on the question of its liability for punitive damages.[2]

2. The Circuit Court erred in construing the jury's verdict against Mountain as imposing $12 million rather than $6 million in punitive damages and in upholding that award as not excessive.

3. The Circuit Court erred in holding that the independent contractor defense to vicarious liability for compensatory damages was unavailable to Mountain as a matter of law.

4. The Circuit Court erred (a) in holding that the Mountain-DOH contract unambiguously imposed upon Mountain a duty to protect public safety off the job site; and (b) relatedly,

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[2] Following this Court's jurisprudence, we address, first, the question whether ***any*** punitive damages award is appropriate and, second, the question whether the *particular* punitive damages award rendered by the jury is excessive. *See Syl. Pt. 7, Alkire v. First Nat'l Bank of Parsons,* 197 W. Va. 122, 125, 475 S.E.2d 122, 125 (1996).

in precluding the official who signed the Mountain-DOH contract on behalf of the DOH from testifying that the contract imposed upon Mountain a duty to protect public safety only at the job site.

DISCUSSION OF THE LAW

I. The Circuit Court Erred In Denying Mountain's Motion For Judgment As A Matter Of Law On Punitive Damages.

A. Facts and Background

The relevant facts are best understood with reference to the trial court's two distinct rationales for submitting punitive damages to the jury: (1) Mountain "either expressly or impliedly ratified [Kirk's and Galloway's] actions or omissions" (6/27/01 Trial. Tr. at p. 33; *see also Dec.* 21 Opinion at pp.7-8; June 7, 2001 Order at p. 4); and (2) Mountain itself engaged in actions or omissions that may warrant imposition of punitive damages (6/27/01 Trial Tr. at p. 29; *see also.* June 7, 2001 Order at p. 6).

First, the undisputed facts bearing on the trial court's ratification theory: Prior to the accident, Mountain had no knowledge that Galloway or Kirk had been involved in any accidents or had been cited for violations of any motor vehicle laws. *E.g.,* 6/4/01 Trial Tr. at p. 181 (testimony of plaintiffs' expert Gary Huey that "there is nothing that indicates that they [Mountain] were aware of [the condition of the tires before the day of the accident]"); 6/14/01Trial

Tr. at p. 39 (testimony of Claudia Wheeler, Mountain's scale master, that she cannot see the condition of tires on trucks from her position at the asphalt plant); 6/14/01 Trial Tr. at p. 40 (Wheeler's testimony that limestone dust at the plant coats the tires, further concealing their condition); 6/14/01 Trial Tr. at pp. 97-98 (testimony of Rick Johnson, Mountain's area manager, that Mountain had never had any problems in the past with any of Galloway's drivers and that Mountain was unaware of any problems with Galloway's trucks other than minor mechanical ones); 6/14/01 Trial Tr. at pp. 106-07 (Johnson's testimony that he did not look at the tires on the truck before it departed from the plant); 6/14/01 Trial Tr. at p. 174 (testimony of Mountain's expert, David Stopper, that, prior to this accident, Galloway had no record of any violations). The day after the accident, Mountain's relationship with Galloway terminated when Galloway went out of business. 6/21/01 Trial Tr. at pp. 168-69.

Second, the facts concerning Mountain's own actions or omissions, which are likewise undisputed: Neither Mountain nor any other paving contractor conducted routine inspections of carriers' trucks (or drivers) before the trucks departed from the asphalt plant with a full load, 6/14/01 Trial Tr. at pp. 195-97. Instead, the settled industry view, endorsed by the DOH official who had signed the Mountain-DOH contract on behalf of the DOH, was that the paving contractor's legal responsibility to protect the safety of the public concerned only the project site, not the public roads leading to that site. 6/6/01) Trial Tr. at pp. 132-34. *See also* 6/21/01 Trial Tr. at p. 180 (truck driver Charlie White's testimony that shippers did

not customarily inspect trucks hired to transport the goods).

B. Argument

Neither of the Circuit Court's rationales for submitting the issue of punitive damages to the jury has merit. As to the ratification theory, plaintiffs failed to satisfy the well-settled requirement that the principal be shown to have had *actual and prior knowledge*—at the time of the supposed ratification—of the misconduct by its agent that caused the plaintiffs injury (or of similar conduct preceding the injury). The direct liability theory (i.e., based upon Mountain's own acts or omissions) is deficient for a related reason; Mountain did not possess the mental state—"extreme negligence or wanton disregard" *(Alkire* v. *First Nat 7 Bank of Parsons,* 197 W. Va. 122,131,475 S.E.2d 122, 132 n.12 (1996))—that West Virginia law makes a prerequisite to the imposition of punitive damages, First, Mountain lacked notice that it was under a duty to ensure the safety of the public while its contractor was transporting material between its plant and the project site. In fact, it could not have had such notice because no such duty existed until the Circuit Court created it before trial. Second, even if Mountain had such a duty, and even if Mountain breached that duty by failing to inspect the truck at issue,[3] its unwitting neglect was far

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[3] We assume *arguendo,* and only for purposes of this argument on punitive damages, that Mountain's conduct breached this newly minted duty. In fact, however, it is our position that Mountain was entitled to judgment as a matter of law on all issues, both because of the independent contractor defense,

from "extreme" or "wanton" given Galloway's until-then perfect safety record. Accordingly, the Circuit Court should have granted Mountain judgment as a matter of law on the issue of liability for punitive damages.

1. Mountain neither expressly nor impliedly ratified Galloway's conduct.

The very cases cited by the Circuit Court in its June 7, 2001 Order,[4] *Jarvis* v. *Modern Woodmen of Am.,* 185 W. Va. 305,406 S.E.2d 736 (1991) (per *curiam),* and *Addair v, Huffman,* 156 W. Va. 592,195 S.E.2d 73 9 (1973), as well as other authorities, demonstrate that neither an express nor an implied authorization or ratification can occur unless the ratifying party (1) has actual and prior knowledge *(i.e..* not merely constructive knowledge) at the time of the supposed ratification of the conduct that gave rise to the plaintiffs injury;

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discussed fully below, and because the evidence was in any event insufficient to show even negligence on Mountain's part.

[4] The Circuit Court's *Garnes* Order continued to reflect its mistaken impression that a principal's *constructive* knowledge of its agent's punishable conduct—that is, what the principal *should have known* about the wrongful nature of its agent's conduct—suffices to establish the ratification theory of punitive damages. *See, e.g.,* Opinion Order On Review Of Punitive Damages 14 ("[F]or the punitive award for authorizing or ratifying the actions of Billy Kirk and/or Jerry Galloway, the jury may have relied upon evidence that Mountain Enterprises, Inc. employees knew *or should have known* of the bald tires, and loaded the truck anyway.") (emphasis added).

or (2) had previously approved or countenanced similar conduct.[5]

In *Jarvis,* for example, an insurance company sought to insulate itself from punitive liability for the actions of its agent, who had induced the plaintiff's decedent to submit false information in an application for life insurance, a misrepresentation that resulted in denial of benefits to the plaintiff. This Court rejected the company's argument, observing, *inter alia,* that "[e]ven before the [agent] sold insurance to Mr. Jarvis, [the company's] agency manager reported that [the agent] was lazy,

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[5] Section 909 of the Restatement (Second) of Torts provides a helpful explanation of the actual knowledge requirement, addressing both (1) the situation where the principal has prior knowledge of the characteristic of the agent that caused the accident in question, and (2) the situation where the principal learns of the conduct in question and, with that knowledge, expresses his approval.

The first scenario is described in Illustration 1: "A employs an ejectment company to dispossess a tenant. A *knows* that the company has a reputation for using undue force in dealing with tenants. An employee of the company, in accordance with its usual methods, commits an unprovoked battery upon B, the wife of the tenant, in order to induce her to leave. In an action by B against A, punitive damages can properly be awarded." Restatement (Second) of Torts § 909, Must. 1 (1979) (emphasis added).

The second scenario is described in Illustration 2: "A, the owner of a theatre, employs a special policeman to keep order. In ejecting a small boy from the theatre, the policeman cruelly abuses him. *Upon learning the facts,* A expresses his approval. Punitive damages can properly be awarded against A in an action for the battery." *Id.,* § 909, Must. 2.(emphasis added). Neither of these two types of scenario is even arguably presented in this case.

incompetent and disgruntled" (185 W. Va. at 312, 406 S.E. 2d at 743), and that the company had "quickly bec[o]me aware of [the agent's] unusual payment method"(*id.*) that was central to his scheme to increase his commissions. In short, the company had actual knowledge — prior to consummation of the tort — of conduct suggesting that its agent was engaged in improper behavior. The company, by continuing to use the agent notwithstanding its actual knowledge of his similar misconduct in the past, ratified the agent's present misconduct. Mountain had no comparable knowledge in this case.

The early case of *Hams v. Parkersburg, M. & I. Ry. Co.*, 75 W. Va. 613, 84 S.E. 923 (1915), similarly demonstrates that ratification does not occur unless the principal has actual and prior knowledge of the conduct being ratified. As an initial matter, *Hains'* oft-quoted syllabus point 3 clearly states that knowledge is intrinsic to the concept of ratification:

> If a master *knowingly* employs or retains a careless and incompetent servant, he thereby impliedly authorizes or ratifies his negligent acts, committed in the course of his employment, and, if the servant's negligence is wanton and willful or malicious, the master is liable for exemplary or punitive damages.

75 W. Va. at 613, 84 S.E. at 923 (emphasis added). The facts of *Hains,* which this Court held sufficient

to warrant an instruction on ratification, 75 W. Va. at 625, 84 S.E. at 927, illustrate the actual knowledge requirement. The plaintiff had been a passenger on a rail car and, after departing from the train and walking around the back of it, was struck in the ankle by a pick thrown by the conductor. Subsequently, a witness overheard the president of the railway company admit that "some of the conductors are awfully careless and there has been complaint about this conductor about being careless." 75 W. Va. at 617, 84 S.E. at 925 (internal quotation marks omitted). As this Court characterized the evidence, it "tended to prove that the railway company retained in its employ a conductor whose incompetency its president, having power to discharge employees, admitted he knew of." *Id.* Just as in *Jarvis,* the employer's actual and prior knowledge of its employee's similar past misconduct sufficed to warrant the imposition of punitive liability on the employer under the ratification theory: the railway company ratified the misconduct by failing to terminate or otherwise discipline its employee after prior incidents of negligence. *Accord Baiter v. Wheat First Sees,,* 643 F.Supp. 1420, 1428 (S.D. W. Va. 1986) ("If the Plaintiffs can prove knowledge on the part of [the principal] of [the agent's] defalcations, or that it continued to employ him while suspicious of his actions, an award of punitive damages may be appropriate.").

The present case stands in marked contrast to *Jarvis* and *Hains,* for it is undisputed that Mountain had no *actual* knowledge prior to the accident that (1) Galloway's trucks had ever been involved in an accident of any kind due to an unsafe condition in

those trucks; (2) Galloway had ever before used unsafe tires on its trucks; or (3) the truck driven on that day by Kirk had an unsafe tire. Any contrary conclusion would be sheer speculation.[6]

Moreover, even if it could properly be surmised, despite the absence of direct evidence, that some Mountain employee was or should have been aware of the bald tire and failed to act (which, again, would not suffice as authorization or ratification), there is no evidence that any *supervisory or managerial employee* capable of giving Mountain's authorization possessed such knowledge. *See* Restatement (Second) of Torts § 909(d) ("Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if, * * * the principal or *a*

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[6] The Circuit Court suggested that there was evidence tending to show that Mountain did have actual knowledge that the tire on Kirk's truck was bald. *See* Opinion Order On Review Of Punitive Damages pp. 28-29. Specifically, the Court pointed to evidence that a Mountain employee, Errna Collier, allowed Kirk to borrow her phone, which Kirk used to call Galloway to inform him of the bald condition of the tires. The Court then suggested that the jury might have found that Collier overheard the Kirk-Galloway phone conversation, thereby obtaining actual knowledge of the bald condition of the tires. The Circuit Court's recollection of the evidence on this point is inaccurate. Collier's assertions on the witness stand that (1) she did not overhear the conversation (6/22/01 Trial Tr. at pp. 8, 15), and (2) that she had no opportunity to see the condition of the tires from her position across the road from where the track was parked (6/22/01 Trial Tr. at p. 14), went unrebutted. Mr. Kirk testified that this call to Galloway which Mountain's employee purportedly "overheard" did not occur because "[y]ou couldn't get a signal because we were so far up there. So on the way back down the road I stopped at a pay phone ... ." 6/15/02 Trial Tr. at pp. 82-83.

managerial agent of the principal ratified or approved the act.") (emphasis added). Absent such prior and actual knowledge when hiring or retaining Galloway, Mountain cannot possibly have ratified the conduct in question. Nor did Mountain continue to utilize the services of Galloway or Kirk subsequent to the accident. Accordingly, the evidence is simply insufficient to sustain punitive damages on a ratification theory, and Mountain is entitled to judgment as a matter of law with respect to that basis for punitive damages. In any event, the legal issue thus presented is an important one that warrants this Court's plenary consideration.

2. Mountain's own acts and/or omissions.

With regard to Mountain's direct liability, there was no evidence that Mountain engaged in any affirmative act of an unlawful nature.[7] The Circuit

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[7] The Circuit Court may have relied in part on Mountain's allegedly unlawful affirmative act of overloading the truck at issue. *See* West Virginia Code § 17C-17-9(b); Instructions at 11 ("[Y]ou may consider in your deliberations on the issues of punitive damages that the Galloway truck was; overweight."); Oct. 26, 2000 Order ¶ 30-31, at p. 12. We first point out that whether the truck was overweight was disputed, and if it was, it was a matter of no more than eight thousand pounds (the truck weight was 63,000 pounds as allowed under the DOH contract, though plaintiffs' expert opined that 55,000 pounds was the legal limit). 6/4/01 Trial Tr. at pp.159, 196-98, 200.

This conduct provides no support for the imposition of punitive damages upon Mountain. Under *Shaffer v. Acme Limestone Co.*, "a private cause of action may be maintained [under section 17C-17-9(b)] for injury or harm *resulting from its violation*," 206 W. Va. 333, 348, 524 S.E.2d 688, 703 (1999) (emphasis added). In this case, causation is lacking: There was no

Court appears to have relied principally upon an omission: Mountain's failure to inspect the Galloway truck before the accident occurred. But that cannot support punitive damages for two reasons. First, Mountain had no notice that it was under a duty to ensure the safety of the public while its contractor hauled materials between its plant and the project site. Second, even if Mountain had such a duty, and even if Mountain breached that duty by failing to inspect the truck at issue, Mountain's mental state can hardly be described as "wanton, willful, or reckless" *(Alkire,* 197 W. Va. at 129, 475 S.E.2d at 129 (quoting *Syl, Pt. 4 Mayer* v. *Frobe,* 40 W. Va. 246, 22 S.E. 58(1895)), in light of the fact that, prior to the accident on April 23,1999, Galloway had never before been involved in an accident of any kind due

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evidence whatever indicating a "plausible connection" *(id.)* between any overloading of the truck and the blow-out of the tire that caused the accident. The alleged violation of the statutory weight limit therefore does not furnish a ground on which Mountain may be held liable for compensatory damages. Indeed, experts for both sides agreed that any past or present overloading of the truck had nothing to do with the condition of the tire or the blow-out that precipitated the accident. *See* 6/4/01 Tr. 201 (affirmative response of plaintiffs' expert Gary Huey to question whether "[t]his accident could have happened even if the truck were empty"); 6/14/0) Tr. 186-87 (testimony of Mountain's expert Dr. David Stopper that any overloading did not cause the accident). It follows that Mountain's alleged overloading of the truck cannot be used to justify a punitive damages award. *See Garnes,* 186 W. Va. at 667, 413 S.E.2d at 908 (1991) (holding that a jury that has not found any compensatory damages may not impose punitive damages); *See also State Farm Mut. Auto. Ins. Co. v. Campbell,* 123 S. Ct. 1513, 1523 (2003) (as a matter of due process, "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages").

to an unsafe condition in its trucks or a negligent act of its drivers.

Prior to the Circuit Court's ruling on October 26, 2000, there does not appear to have been any judicial determination, statute, or regulation finding or declaring that paving contractors are contractually or otherwise subject to a non-delegable duty to protect the safety of the public beyond the project site, much less how that duty might translate to equipment owned, operated and controlled by an independent contractor.[8] Indeed, the only guidance then available indicated to Mountain that it had no such duty; As the Head of the Contract Administration Division for the DOH explained in Mountain's offer of proof (and would have testified before the jury), the DOH construed the contract as requiring Mountain to ensure public safety only at the project site. 6/6/01 Trial Tr. at pp. 132-34.

It is clear, then, that Mountain lacked notice of any duty to provide for public safety between its plant and the project site. This lack of notice might not immunize Mountain from liability for plaintiffs' *compensatory* damages. We readily acknowledge that our legal system contemplates judicial announcement of new legal principles, especially where changed facts and circumstances warrant.

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[8] The Circuit Court certainly did not point to any authority. Rather, in its subsequent Order Denying Motions For New Trial And Granting Certain Other Relief, at p.2, the court could say only that Mountain's duty to protect the public safety on the roadways between the asphalt plant and the project site was grounded in the court's sense of "law as well as public policy."

But punitive damages are another matter entirely. Because they impose punishment (financially and reputationally), they trigger special fairness concerns under the Fourteenth Amendment to the United States Constitution. *See BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive notice * * * of the conduct that will subject him to punishment * * *.").

A growing body of case law, to which the Circuit Court paid no heed, has enforced the notice requirement in the specific situation presented here: the announcement of a principle of law that is "novel or otherwise poorly recognized." *Kolstad v. Am. Dental Ass'n,* 527 U.S. 526, 537 (1999) (identifying this as one circumstance where intentional employment discrimination does not give rise to punitive damages liability). *See also McFarland v. Utica Fire Ins. Co. of Oneida County,* 814 F. Supp. 518, 527 (S.D. Miss. 1992) (accepting plaintiffs' interpretation of ambiguous provision in insurance policy and awarding compensatory damages, but denying plaintiffs' request for punitive damages because "[t]here is no case directly on point in Mississippi which purports to interpret the thrust of defendant's intentional acts exclusion clause" and the defendant therefore "had an arguable basis to deny the plaintiff's claim"); *Harrison* v. *Allstate Ins. Co.,* 662 So. 2d 1092, 1095 (Miss. 1995) (punitive damages unwarranted because "[t]he issue presented in this case is one of first impression in this state); *Strickland v. Motors Ins. Corp.,* 970 F.2d 132, 137-38 (5th Cir. 1992)(*per curiam)* ("The

statutory language here is less than clear and MIC's interpretation of the statute * * * does not make it susceptible to punitive damages."); *Larr v. Minnesota Mut. Life Ins. Co.*, 924 F.2d 65, 67 (5th Cir. 1991) (similar); *Dunn v. State Farm Fire & Cas. Co.*, 711 F. Supp. 1362, 1365 (N.D. Miss. 1988) (similar); *Silbergv. California Life Ins. Co.*, 521 P.2d 1103, 1110(Cal. 1974) (similar).[9] In short, the imposition of punitive damages must await a case that arises *after* declaration of a previously unestablished principle of law.

The holdings in these cases apply *a fortiori* to the instant matter. Not only was there no legislative, judicial, or administrative guidance prior to the accident indicating that a paving contractor has a duty to inspect its independent contractor's equipment in order to provide for public safety beyond the project site, the DOH had an administrative understanding that **no** such duty existed. Imposition of punitive damages upon Mountain would contravene the notice principle and the policies — deterrence and fairness — that underlie it.

Even aside from Mountain's justifiable lack of notice of its duty to protect the public safety beyond

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[9] See also *Hansen v. Harrah's*, 675 P.2d 394, 65 (Nev. 1984)(denying request for punitive damages for newly recognized tort of retaliatory discharge, explaining that "[i]t would be unfair to punish employers for conduct which they could not have known beforehand was actionable in this jurisdiction"); *Murphy v. City of Topeka-Skaymee County Dept. of Labor Servs.*, 630 P.2d 186,193 (Kan. 1981) (similar); *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 360 (111. 1978) (similar); *Nees v. Hocks*, 536 P.2d 512, 517 (Or. 1975) (similar).

the project site, Mountain lacked the "wanton, willful, or reckless" state of mind that is an additional prerequisite to punitive liability under West Virginia law. *See Syl. Pt. 4, Mayer v. Frobe,* 40 W. Va. 246, 22 S.E. 58 (1895). Mountain's alleged breach of duty — its failure to inspect the truck that caused the accident — was neither wanton, nor willful, nor reckless. As an initial matter, no one can seriously contend that Mountain *intended* to cause the accident. As to recklessness, the proof is similarly lacking, for there is no evidence that (1) Galloway had ever before been involved in an accident of any kind due to an unsafe condition in its trucks or a negligent act of its drivers; or (2) Galloway had, prior to April 23, 1999, ever used unsafe tires on its trucks.[10] In light of Galloway's clean safety record in these respects, Mountain's failure to inspect the truck—even if a neglect of its duty—certainly did not evince a *conscious* disregard of a safety risk posed by the Galloway operation. *See Baubliiz v. Henz,* 535 A.2d 497, 500 (Md. Ct. Spec. App. 1988) (while agreeing that the plaintiff made a sufficient case, based on "[t]he size and weight of the truck, together with the 'worn' brakes," for ordinary negligence on the part of the defendant, holding that this same evidence was[1] insufficient to support punitive damages because "there was no evidence from anyone that the brakes on the truck had failed either on previous days or on the day in question, until the collision with [plaintiffs] vehicle").

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[10] There was no evidence that Mountain had actual knowledge of the defective condition in the tires that caused the accident. See *supra* pp.8-9, n. 6.

II. MOUNTAIN IS ENTITLED TO REDUCTION OF THE $12 MILLION PUNITIVE DAMAGES JUDGMENT BECAUSE THE JUDGMENT MISCONSTRUES THE JURY'S INTENT ON THE VERDICT FORM AND IN ANY EVENT IS EXCESSIVE.

A. Facts and Background

On the record evidence, the *only* allegedly wrongful "conduct" exhibited by Mountain was its failure to inspect the trucks used by Galloway to transport asphalt from Mountain's plant to the project site. The evidence established, moreover, that the wrongfulness of this conduct — if indeed it was wrongful at all — was minuscule under the circumstances.

After hearing the evidence, the jury was presented with a verdict form that posited two bases for assessing punitive damages against Mountain and called for the jury to determine whether one or both were satisfied. The first interrogatory asked whether Mountain "as the employer of Defendant, Galloway Trucking, conducted itself or the company in such a way that the acts, or failure to act, by Galloway Trucking was expressly or implicitly authorized or ratified by [Mountain] * * *." The second interrogatory asked whether Mountain "engaged in willful, wanton, or reckless conduct; or, acted or failed to act in such a way that it constituted criminal indifference to [its] civil obligation thereby affecting the rights of others * * *." *See* Exhibit A (Verdict Form).

The jury responded affirmatively to each of these interrogatories. It then entered the amount of $6 million against Mountain twice on the verdict form—once on the line provided for the "authorization/ratification" interrogatory, and again on the line provided for the "direct action/omission" interrogatory. These two verdict amounts were never totaled by the jury on the verdict form.

Mountain subsequently urged the Circuit Court to construe the jury's verdict as awarding $6 million rather than $12 million, in view of the verdict form's ambiguity and the rule of lenity, and the impermissible double punishment that a $12 million award would entail, Additionally, Mountain provided the Circuit Court with a detailed submission explaining why either a $6 million or a $12 million award is excessive under *Garnes*. The Circuit Court, rejecting all of these arguments, construed the verdict form as awarding $12 million in punitive damages against Mountain and upheld that award as not excessive. *See* Opinion Order On Review Of Punitive Damages dated December 21, 2001.

B. Argument

1. The Circuit Court erred in construing the ambiguous jury verdict form as intending a $12 million punitive damages award against Mountain.

In theory, the two $6 million entries on the verdict form could reflect either an intent to impose a single $6 million punishment for two different reasons or an intent to have the two sums added together, for a total punishment of $ 12 million. The Circuit Court erred in accepting the latter interpretation. The court's submission of an ambiguous jury verdict form to the jury, compounded by its failure to properly interpret the resulting unclear verdict, raises judicial-administration issues of state-wide importance that this Court should address. *See* 6/27/01 Trial Tr. at pp. 10-14.

First, the verdict form was hopelessly ambiguous and resulted, not surprisingly, in an inscrutable verdict that the Circuit Court erroneously construed against Mountain despite West Virginia's rule of lenity, which requires that ambiguity in matters affecting punishment be resolved in favor of the defendant. Nothing on the form told the jury whether the punishments it was imposing were concurrent or cumulative. The verdict form did not, for example, provide the jury with the opportunity to indicate one total amount of punitive damages. Given that plaintiffs identified

only *a single type of conduct* (albeit described in slightly varying terms) as the basis for the jury's punitive damages verdict—Mountain's failure to inspect the Galloway truck that caused the accident—it is highly improbable that the jury intended to penalize this conduct twice simply because it fit within the two different formulations for punitive liability identified on the verdict form. More plausibly, the jury intended only a single award of $6 million, viewing the two interrogatories as *alternative* rather than cumulative.

That the jury so intended is further suggested by its response to the verdict form's interrogatories regarding Defendant Galloway. Those interrogatories were identical to the interrogatories on Mountain: the first set forth the "authorization/ratification" basis; the second, the "direct action/omission" basis. And the jury followed the same pattern for Galloway as it did for Mountain, awarding the identical amount in response to each interrogatory (in that instance, $50,000). If, as the Circuit Court held, the two bases for awarding punitive damages were cumulative rather than alternative, it is highly unlikely that the jury would have reached the result it did. Given the markedly greater proximity of Galloway to the causal chain of the accident (Galloway, for example, owned the truck, equipped the truck with these tires, and was informed by Kirk that the tire was bald), it is difficult to imagine that the jury would find the conduct of Mountain and Galloway to be equal parts ratification/authorization and direct action/omission. *See* 6/15/01 Trial Tr. at pp. 75-84.

If, on the other hand, the jury viewed the two interrogatories as *alternative* bases for imposing punitive damages, and found both bases established by the evidence, then the reason for its entry of identical amounts next to each of the two interrogatories is self-evident.

At the very least, the jury's verdict is ambiguous as to whether an award of $6 million or $12 million was intended. When it comes to imposing punishment, the law in West Virginia, as elsewhere, calls for resolving ambiguities in favor of the defendant. *See, e.g., State v. Zain,* 207 W. Va. 54, 60, 528 S.E.2d 748, 754 *(1999); State v. Brumfield,* 178 W. Va. 240, 246, 358 S.E.2d 801, 807 (1987). Although the issue arises most often in the context of statutory construction, courts also have applied the principle of lenity when confronted with ambiguous jury verdicts. *See United States v. Baker,* 16 F.3d 854, 857 (8th Cir. 1994) ("[w]hen a defendant is convicted by an ambiguous verdict that is susceptible of two interpretations for sentencing purposes, he may not be sentenced based upon the alternative producing the higher sentencing range"); *United States v. Quicksey,* 525 F.2d 337, 341 (4th Cir. 1975) (similar). Further, although the rule of lenity (and its application to ambiguous jury verdicts) was initially developed in the criminal law context, this Court has readily applied criminal law principles in civil cases in which punitive damages are imposed, to the extent such principles can be sensibly applied. *See Raines v. Faulkner,* 131 W. Va. 10,26,48 S.E.2d 393 (1947) (recognizing exception, for civil cases involving punitive damages, to the general rule that the good character of the

defendant is not admissible in a civil case). *See also State Farm,* 123 S. Ct. at 1520 (observing that punitive damages "serve the same purposes as criminal penalties" and noting that fact that "defendants subjected to punitive damages in civil cases have not been accorded the protections available in a criminal proceeding * * * increases our concerns over the imprecise manner in which punitive damages systems are administered"); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 432 (2001) (punitive damages are "quasi-criminal" and "operate as private fines intended to punish the defendant and to deter future wrongdoing") (internal quotation marks and citation omitted); *Drug Emporium, Inc. v. Peaks,* 488 S.E.2d 500, 506 (Ga. Ct. App. 1997) (reversing punitive damages judgment because, *inter alia,* "the verdict form was * * * ambiguous").

Thus, the quasi-criminal character of punitive damages and the United States Supreme Court's concerns about "the imprecise manner in which punitive damages systems are administered," combined with the fact that such damages do not serve as compensation to the plaintiffs, who therefore have a lesser stake in their administration, makes it appropriate to resolve ambiguities in a jury's punitive damages verdict in favor of the more lenient construction — here, a $6 million punitive damages award against Mountain.

2. The Circuit Court erred in its failure to find that the $12 million punitive damages award against Mountain was a double recovery.

The Circuit Court should have rejected the $12 million punitive damages award because it impermissibly imposes a double punishment upon Mountain for the same conduct. "A plaintiff may not recover damages twice for the same injury simply because he has two legal theories." *Syl. Pt. 7, Harless v. First Nat'l Bank,* 169 W. Va. 673, 289 S.E.2d 692 (1982). This principle has been applied to a "double recovery" of punitive damages. *See Tudor v. Charleston Area Med. Ctr., Inc.,* 203 W. Va. 111,132, 506 S.E.2d 554, 575 (1997) ("it is incumbent upon the circuit court to review such jury verdicts closely and to determine whether all or a portion of the damages awarded by the jury for intentional infliction of emotional distress are duplicative of punitive damages such that some or all of an additional award for punitive damages would constitute an impermissible double recovery"); *DzinglisH* v. *Weirton Steel Corp.,* 191 W. Va. 278, 288, 445 S.E.2d 219, 229 (1994) ("[b]y allowing the jury to consider punitive damages, the trial court permitted the jury to stack punitive damages upon punitive damages, thereby effectively imposing two punitive damage verdicts against Weirton Steel for the same acts"). And "[i]f the circuit court determines that an impermissible double recovery has been awarded, it shall be the court's responsibility to correct the verdict." *Tudor,* 203 W. Va. at 132, 506 S.E.2d at 575.

Here, assuming *arguendo* that the jury did intend to render cumulative punishments of $6 million on each theory, the award would constitute an impermissible double recovery under the foregoing principles. The only arguably culpable conduct by Mountain was its failure to inspect the truck that caused the accident. The jury apparently, understood that conduct to fit within each of the two bases for punitive liability provided on the verdict form. But the fact that Mountain's failure to inspect might be described in two distinct ways does not make that conduct subject to double punishment. Under *Tudor,* the Circuit Court was obligated to eliminate the portion of the award that constitutes a double recovery —here, $6 million.

3. The punitive damages are excessive both under *Garnes* and as a matter of due process.

This case provides the Court with an opportunity to consider and refine its prior decision in *Garnes v. Fleming Landfill, Inc.* in light of the U.S. Supreme Court's recent landmark decision in *State Farm.*

Garnes requires a trial court independently to review a jury's punitive damages award for excessiveness, and provides for automatic review of the trial court's determination by this Court. See Syl. Pt. 5, 186 W.Va. 656, 413 S.E.2d 897 (1991). Nine factors guide this review (*id.* at Syl. Pts. 3-4,):

(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater;

(2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him;

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the

award discourages future bad acts by the defendant;

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages;

(5) The financial position of the defendant is relevant;

(6) The costs of the litigation;

(7) Any criminal sanctions imposed on the defendant for his conduct;

(8) Any other civil actions against the same defendant, based on the same conduct; and

(9) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.[11]

In addition, federal Due Process protections provide important constraints on a jury's award of punitive damages. *See Stale Farm,* 123 S. Ct. at

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[11] The first five factors are applied by the jury in its deliberations on the size of the punitive damages award. *Garnes,* 186 W.Va. at Syl. Pt. 3,413 S.E.2d. The last four are ordinarily applied by the trial court in the first instance during its review of the jury's award. *Id.* at Syl. Pt. 4.

1519 ("While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards."). Thus, the U.S. Supreme Court has prescribed three guideposts "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases" *(id.* at 1520) that a court must employ in evaluating the excessiveness of a jury's punitive damages award. Because these guideposts' are largely complementary to the *Garnes* factors, we discuss them in the context of our *Garnes* analysis.

Application of *Garnes* and the federal guideposts to the evidence in this case establishes that the punitive damages award against Mountain (whether it be $6 million or $12 million) is clearly excessive and must be reduced.[12]

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[12] It is important to recognize, at the outset, that plaintiffs failed to present evidence on certain factors (such as costs of litigation), or elements of factors, (such as the potential harm from the defendant's conduct beyond that reflected in the awards of compensatory damages). Those gaps may not be filled at this stage with speculation.

(1) Relationship between punitive damages and harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred

Mountain does not contend that the actual harm caused by the accident was anything but significant. Rather, the deaths of three persons (two of whom were children) is admittedly grievous and tragic. As to potential harm, however, the Circuit Court could only speculate that "[s]hould a similar truck with similar tires be driven again, there is little doubt that a similar accident would occur" and that "should there be other vehicles involved when it does occur, death of the occupants would again be a likely result." Opinion Order On Review Of Punitive Damages pp. 17-18. This speculation has no support in the record, and should be rejected for that reason alone. There is no evidence that Mountain used "dangerous, overloaded trucks" regularly — or, indeed, on any other occasion. The same is true of Galloway: the evidence at trial indicated that the presence of a bald tire on one of Galloway's trucks was a rarity. Charlie White, one of Galloway's other drivers, testified that Galloway had "a room in his garage where he keeps tires on hand" and that, during the two to three years that he drove for Galloway, White had never been sent out with unsafe tires on his track. 6/21/01 Trial Tr. at p. 171. Rather, this accident should be recognized as what it was a confluence of circumstances, many by chance, that resulted in a remarkably unusual and tragic event highly unlikely to ever be repeated.

Returning to the actual harm, it is important to keep in mind that this factor is only one of nine in the *Garnes* inquiry. Where a defendant's reprehensibility is low (as is the case here), the substantiality of the harm does not by itself justify large punitive damages. *See Jenkins v. Arab Termite & Pest Control of Fla., Inc.,* 422 So: 2d 922 (Fla. Dist. Ct. App. 1982) (in wrongful death action, affirming trial court's remittitur of punitive damages award from $125,000 to $50,000 because the defendant's reprehensibility was low); *Richards v. Michelin Tire Corp.,* 21 F.3d 1048, 1058-59 (11th Cir. 1994) (in case brought by plaintiff who suffered severe physical injuries and brain damage from tire explosion, setting aside punitive damages award because the defendant's conduct was not reprehensible at all); *Loitz v. Remington Arms Co.,* 563 N.E.2d 397, 427 (Ill. 1990) (similar). Substantial harm ordinarily means substantial compensatory damages (here, $6 million), which, as the Supreme Court suggested in *State Farm,* may in themselves fulfill the deterrent purpose of punitive damages and diminish the need for any substantial additional penalty. 123 S. Ct, at 1521.

(2) Reprehensibility of the defendant's conduct

This factor, which the United States Supreme Court has described as "the most important indicium of the reasonableness of a punitive damages award" *(State Farm,* 123 S. Ct. at 1521 (internal quotation marks omitted)), weighs strongly in Mountain's favor. First, at the time of the accident, Mountain—though well aware of its

duty to maintain safety at the project site—lacked reasonable notice that it would later be held to have a duty to insure safe conditions on the roadways between its plant and the project site through inspection of its independent contractor's trucks:

- The proffered testimony of a senior DOH representative revealed that DOH did not expect or intend that Mountain's contract required it to ensure safety on the roadways between Mountain's plant and the project site.[13]

- It was standard practice for West Virginia DOH contractors not to perform independent inspections of subcontractors' equipment.

- Prior to the Circuit Court's ruling by Order dated October 26, 2000, there does not appear to have been any judicial determination, statute, or regulation finding or declaring that (1) hauling asphalt is an inherently dangerous activity; or (2) paving contractors are contractually or otherwise subject to a nondelegable duty to protect the safety of the public beyond the project site.

We do not contend that the Circuit Court or this Court lacks the ability to make new law in this area, or that an industry practice fully insulates Mountain from liability. And maybe Mountain could

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[13] Even if not relevant to the issue of liability, this excluded testimony was highly pertinent to the jury's determination of the degree of reprehensibility of Mountain's conduct.

be held liable for *compensatory* damages under a new-found duty, without regard to whether it had prior knowledge of that duty. But punitive damages are another matter. And even if Mountain's conduct crossed the threshold for imposition of punitive damages, Mountain's undisputed lack of notice of any duty to act demonstrates that its conduct was not reprehensible, and warrants a substantial reduction of the punitive damages award. *See BMW,* 517 U.S. at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive notice * * * of the conduct that will subject him to punishment * * *").

Putting aside Mountain's lack of knowledge that it had the duty that the Circuit Court later imposed, there is absolutely no evidence indicating that Mountain's failure to fulfill that duty was reprehensible, as opposed to merely negligent. In particular:

- There was no evidence indicating that Galloway had ever before been involved in an accident of any kind due to an unsafe condition in its trucks or a negligent act of its drivers, either during the five-year business relationship between Mountain and Galloway or at any other time, or that Mountain was on notice that Galloway might be operating unsafely.

- There was no evidence that, on or before April 23, 1999, any employee of Mountain

was aware that a tire on the Galloway truck driven by Kirk was unsafe.

- There was no evidence that Mountain had ever pressured its contractors to sacrifice safety in order to meet deadlines or reduce costs.

- There was no evidence that Mountain had ever fallen short of meeting its duty to ensure the safety of the public when such a duty was clear, *i.e.,* on its job sites, and there was absolutely no evidence of malice, intent to injure, or any practice of compromising public safety in order to save costs.

Turning to Mountain's conduct in the wake of the accident that gave rise to this lawsuit, there can be no question that Mountain conceded the factual predicate of plaintiffs' claim (that Mountain did not inspect the truck at issue) and exhibited a good-faith attitude toward settlement, which warrant a lower punitive damages award under this *Garnes* factor. The Circuit Court's conclusion that Mountain's offer of $3.2 million (or its subsequent, slightly lower offer of $3 million) was insufficient because it was lower than the ultimate award is unfounded. Good-faith settlement proposals almost invariably are less than the amount that the plaintiff, *if successful,* might be likely to recover at trial. But they offer certainty of recovery, whereas the plaintiff who goes to trial may come away with nothing and often be exposed to the unpleasantness of having to relive painful events. A settlement offer, as here, that is roughly one-half of

the ultimate compensatory award is plainly within the bounds of the reasonable and demonstrates good faith.[14]

The Circuit Court was equally mistaken in concluding that Mountain acted in bad faith by reducing its offer during the trial. Parties (whether plaintiffs or defendants) often make their settlement offers less generous once they can no longer obtain the cost savings associated with avoiding preparation for trial. That is hardly an indication of bad faith.

(3) Removing the defendant's profit from the wrongful act and deterring future bad acts.

Neither party presented evidence of Mountain' s profit from its failure to inspect the truck that caused the accident, but plainly the amount was negligible. The Circuit Court found only one piece of evidence to be tangentially relevant: the $95,000 contract price for the project to which the Galloway truck was traveling. This figure, of course, hardly supports a multimillion dollar punishment; to the contrary, it is dwarfed by the $6 million compensatory damages award alone.

Whatever the profit from the wrongful conduct may be, punitive damages of $6 million (let alone $12 million) are grossly excessive to remove it, especially given that Mountain is subject to nearly

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[14] Mountain's good faith is further corroborated by the decision of the Estate of Leigh Ann Poindexter to *accept* settlement in the amount of $1.7 million.

$6 million in compensatory damages and already paid $1.7 million in settlement of the action brought by the Estate of Leigh Ann Poindexter. As the United States Supreme Court has recently explained, no punitive award is necessary when compensatory damages are sufficiently high to punish the defendant and deter similar conduct in the future: "It should be presumed that a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm,* 123 S. Ct at 1521. Here, there can be little doubt that no punitive damages award, in conjunction with the $6 million compensatory damages award and the $1.7 million settlement, was needed to adequately remove any wrongful Mountain profit and deter similar conduct by Mountain in the future. Although the Circuit Court recognized that this factor points in favor of reducing the punitive damages award, the court apparently did not understand how strongly it points in that direction.

(4) The relationship of punitive damages to compensatory damages

The ratio of punitive to compensatory damages is 1:1 if this Court agrees that the jury should be deemed to have imposed a single $6 million punishment or 2:1 if this Court disagrees. While neither ratio falls outside the 5:1 "outer limit of punitive damages" set forth in *TXO Prod, Corp. v.*

AllianceRes. Corp., 187 W. Va. 457, 476, 419 .S.E.2d 870, 889 (1992) as a "rough rule of thumb, the compensatory damages in this case—$6 million—are "very high" in absolute amount and therefore not strictly subject to the 5:1 guideline. *Id.* At 476, 419 S.E.2d at 889 n:12.[15] As the United States Supreme Court recently made clear in *State Farm,* "[i]t should be presumed that a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm,* 123 S. Ct at 1521. *See also Inter Med. Supplies, Inc. v. EBl Med. Sys., Inc.,* 181 F.3d 446, 467-68 (3d Cir. 1999) ("we take into consideration that high, easily calculable compensatory damages may more appropriately be accompanied by a lower punitive damages ratio"; reducing punitive/compensatory ratio from 1:1 to 1:48),

Furthermore, a mechanical comparison of the ratio in this case to the ratios in other cases paints an incomplete picture. *TXO's* 5:1 outer limit is meant to be just that—a limit to be applied when the other factors point strongly in the direction of severe punishment. But, as with the first *Garnes* factor, the ratio factor is not a simplistic litmus test and must yield if the second *Garnes* factor

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[15] In the example provided by this Court in *TXO,* a compensatory damages award of $9,025,000 was deemed "very high." 187 W. Va. at 476, 419 S.E.2d at 889 n.12. The award here, whatever it is construed to be, is of comparable magnitude.

(reprehensibility of defendant's conduct) points in a different direction. *See Leather* v. *Ten Eyck, 91* F. Supp. 2d 482, 490 (S.P.N.Y. 2000) (punitive damages award that was twice compensatory damages deemed excessive because "this Court does not perceive a high level of culpability attaching to [the defendant's] conduct"), aff'd No. 00-7703(L), 2001 WL 55787 (2d Cir. Jan. 24, 2001); *Geuss v. Pfizer, Inc.,* 971 F. Supp. 164 (E.D. Pa. 1996) (reducing $150,000 punitive award to $17,500 where compensatory damages were $165,250 and reprehensibility of conduct was low).

(5) The defendant's financial position

The Circuit Court was overly simplistic in concluding that a $12 million punitive damages award "seems to be not so much of a hardship [for Mountain] to bear" (Opinion Order On Review Of Punitive Damages at p. 46), and therefore that this factor indicated that the award was not excessive. Although Mountain has substantial assets, that fact cannot by itself sustain an otherwise excessive punitive damages award. As the United States Supreme Court recently reaffirmed in *State Farm,* "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," 123 S. Ct. at 1525. *See also BMW of N. Am., Inc. v. Gore,* 701 So. 2d 507, 514 (Ala. 1997) (on remand from United States Supreme Court) ("[W]here a defendant has not committed an act that would warrant a large punitive damages award, such an award should not be upheld upon judicial review merely because the defendant has the ability to pay it."); *Bowden v. Caldor, Inc.,* 710 A.2d 267,

279 (Ct. App. Md. 1998) ("[Merely because a defendant may be able to pay a very large award of punitive damages, without jeopardizing the defendant's financial position, does not justify an award which is disproportionate to the heinousness of the defendant's conduct."); *Creative Demos, Inc. v, Wal-Mart Stores, Inc.*, 955 F. Supp. 1032, 1044 (S.D. Ind. 1997) ("[t]he [United States] Supreme Court has consistently stated that the fact that a defendant is a large corporation with deep pockets cannot serve to justify an otherwise excessive punitive damages award"), aff'd in relevant part on other grounds, 142 F.3d 367 (7th Cir, 1998); *Utah Foam Prods. Co. v. The Upjohn Co.*, 930 F.Supp. 513, 531 (D. Utah 1996) ("[m]anifestly, wealth alone does not justify imposition of a disproportionately large punitive damage award").

(6) The costs of the litigation to the plaintiffs

Despite plaintiffs' failure to present any evidence at all on this point, the Circuit Court concluded that their litigation costs were "extremely high" (Opinion Order On Review Of Punitive Damages 53) and pointed toward upholding the award. We suspect that plaintiffs' costs were in fact minuscule compared to the enormous punitive verdict. In any event, because speculation cannot take the place of evidence, the Circuit Court should not have simply assumed the costs of the litigation favored the punitive award.

(7) Criminal sanctions imposed on the defendant for his conduct

No civil or criminal fine or penalty was imposed upon Mountain for any act or omission on its part in connection with this accident, and no such fine or penalty was even potentially applicable under West Virginia law. But the absence of such a benchmark does not obviously weigh in favor of plaintiffs; it simply removes this method of "comparison" *(Vandevender v. Sheetz, Inc.,* 200 W.Va. 591, 605, 490 S.E.2d 678, 692 (1997)) from consideration. Indeed, a growing body of case law views the absence of a statutory fine or penalty as demonstrating that the defendant lacked notice that its conduct could subject it to a large civil punitive award. *See FDIC v, Hamilton,* 122 F.3d 854, 862 (1 10th Cir. 1997); *Groom v. Safeway, Inc.,* 973 F. Supp. 987, 995 (W.D. Wash. 1997) ("the fact, that apparently there is no law imposing civil or criminal penalties for comparable conduct suggests that an enormous punitive damage award is not warranted here"). Accordingly, this factor is either neutral or weighs in favor of finding the award excessive.

(8) Other civil actions against the same defendant based on the same conduct

As explained above, Mountain paid $1.7 million in settlement of a separate civil action, arising out of the same accident and based upon the same conduct, brought by the Estate of Leigh Ann Poindexter. *Garnes* instructs that this payment "should mitigate the punitive damages

award [under review]." 186 W.Va. at 668, 413 S.E.2d at 909.

The Circuit Court concluded, however, that no mitigation was warranted because the $1.7 million settlement is "extremely low in relation to what the jury returned even on compensatory damages [*i.e.*, $6 million for the two children's estates]." Opinion Order on Review of Punitive Damages at p. 59. But the Circuit Court failed to understand that this $1,700,000 amount must be added to the $6,000,000 compensatory damages award in accurately determining whether any punitive award (let alone a substantial one) is necessary to achieve the deterrence goal of punitive damages. *See State Farm,* 123 S.Ct at 1521.

(9) Appropriateness of punitive damages to encourage fair and reasonable settlements where a clear wrong has been committed

As explained in connection with factor (3), *supra,* Mountain's settlement offer of $3,200,000 to plaintiffs qualifies as fair and reasonable, and Mountain's ability to reach settlement in the separate action in the amount of $1,700,000 further demonstrates Mountain's willingness to participate in settlement discussions in good faith. This factor does not assist plaintiffs for another reason: Mountain's conduct did not amount to a "clear wrong" *(Garnes,* 186 W.Va. at 668, 413 S.E.2d at 909). As we also demonstrated in our discussion of factor (3), there was no guidance in statute or case law—prior to the Circuit Court's rulings in the

instant case—that Mountain even had a duty to ensure public safety on the roadways between Mountain's plant and the project site. Further, even assuming that Mountain had such a duty, it is debatable whether Mountain's failure to fulfill that duty was the product of a mental state that was sufficiently egregious to justify any amount of punitive damages, much less a punishment of $6 million (or $12 million). In light of these uncertainties, Mountain's settlement efforts appear especially reasonable and, if anything, weigh in favor of reducing the jury's punitive award.

III. THE CIRCUIT COURT ERRED IN PRECLUDING MOUNTAIN FROM ASSERTING THE INDEPENDENT CONTRACTOR DEFENSE TO VICARIOUS LIABILITY FOR COMPENSATORY DAMAGES.

A. Facts and Procedural Background

The Circuit Court rejected the independent contractor defense, finding three supposed exceptions to the defense applicable on the facts here: (1) the independent contractor was performing "inherently dangerous work" at the defendant's behest, *(Shaffer v. Acme Limestone Co.*, 206 W. Va. 333, 343, 524 S.E.2d 688, 698 (1999)*);* (2) the work being performed required a franchise from a public authority and involved an unreasonable risk of harm to others *(Syl. Pt. 2,Griffith v. George Transfer & Rigging, Inc.,* 157 W. Va. 316, 201 S.E.2d 281(1973)); and (3) the defendant is subject to a non-delegable duty imposed by contract.

B. Argument

None of the Circuit Court's rationales for rejecting Mountain's independent contractor defense has merit. First, although this Court has not yet spoken to the issue, case law from other jurisdictions makes clear that the operation of a tractor-trailer loaded with hot asphalt mix does not constitute an inherently dangerous activity. Second, the public franchise exception to the independent contractor defense does not apply because Mountain's franchise concerned only the actual construction of highway from Midkiff to Branchland Road, not the separate activity incidental thereto of transporting materials to the project site, an activity for which ***Galloway***, not Mountain, held a public franchise. Third, no prior West Virginia case recognizes an exception to the independent contractor defense for a "non-delegable duty imposed by contract," which is not surprising given the substantial tension that would be created with West Virginia's well-established rule that a third-party beneficiary of a contract may assert rights thereunder only if the contracting parties intended the contract to inure to the sole benefit of the third party. Because the contours of the independent contractor defense are of substantial importance to West Virginia businesses, this Court's guidance is much needed.

1. The hauling engaged in by Galloway, however it may be described, does not constitute an inherently dangerous activity.

As this Court recently explained:

> [I]n defining "inherently dangerous," it is not necessary that the work should involve a major hazard. Rather, "[i]t is sufficient if there is a recognizable and substantial danger inherent in the work, ***as distinguished from a danger collaterally created by the independent negligence of the contractor***, which latter might take place on a job itself involving no inherent danger."

Shaffer, 206 W.Va. at 344, 524 S.E.2d at 699 (quoting *Woodson v. Rowland,* 407 S.E.2d 222, 235 (N.C. 1991)) (emphasis added). Although this Court has not yet been presented with the specific question whether the hauling of asphalt "hot mix" in a tractor-trailer on a public roadway qualifies as "inherently dangerous" under this definition of the term, well-reasoned authority from other jurisdictions concludes that it does not.[16]

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[16] This Court has also not yet addressed the slightly more generic issue whether the operation of a fully loaded tractor-trailer is inherently dangerous. This Court's statement in *Griffith v. George Transfer & Rigging, Inc.,* that such activity "involves an unreasonable risk of harm to others" (157 W. Va. 316, 323, 281 S.E.2d 281, 286 (1973)), concerned only the public

Two decisions—one by a California appellate court, the other by the New Jersey Supreme Court—are especially instructive because of their factual similarity to the instant case. In *A. Teichert & Son, Inc. v. Superior Court,* 225 Cal. Rptr. 10 (Cal. Ct. App. 1986), the plaintiff was injured when he collided with a dump track loaded with asphalt. The plaintiff sought to hold Teichert, the asphalt manufacturer, vicariously liable for the truck driver's alleged negligence; Teichert defended itself by pointing to the rule of non-liability for the negligence of an independent contractor, and the plaintiff replied by invoking the "peculiar risk" exception to the rule."[17]

In deciding the matter, the *Teichert* court found "particularly apropos" *(id.* at 662) an illustration in the commentary to section 416 of the Restatement (Second) of Torts, a section that this Court endorsed and quoted in *Shaffer,* 206 W.Va. at 343, 524 S.E. 2d at 698 n.7. Comment d to Section 416, quoted in *Teichert,* 225 Cal. Rptr. at 662 (internal citation omitted), states:

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franchise exception, and therefore its holding on the risks posed by tractor-trailers is "inapposite" to the "inherently dangerous work" exception *(King v. Lens Ltd. P 'ship,* 199 W. Va. 136, 142,483 S.E.2d 265, 271 (1996)).

[17] The terms "peculiar risk" and "inherently dangerous" are interchangeable in this context. See Restatement (Second) of Torts § 427 cmt. a (1965) ("The rule ['Negligence as to Danger Inherent in the Work'] stated in this Section is closely related to, and to a considerable extent a duplication of, that stated in § 416, as to work likely to create a peculiar risk, of harm to others unless special precautions are taken.").

> [I]f a contractor is employed to transport the employer's goods by truck over the public highway, the employer is not liable for the contractor's failure to inspect the brakes on his truck, or for his driving in excess of the speed limit, because the risk is in no way a peculiar one, and only an ordinary precaution is called for. But if the contractor is employed to transport giant logs weighing several tons over the highway, the employer will be subject to liability for the contractor's failure to take special precautions to anchor them on his trucks.

Applying this framework, the court rejected the plaintiffs attempt to invoke the "peculiar risk", exception. The court reasoned that "[t]here was no direct relationship between the particular work performed by Farmer, i.e., hauling a truck load of asphalt, and the accident. The accident could have occurred just as easily if Fanner were driving a standard passenger vehicle or an 'eighteen-wheeler'" (225 Cal. Rptr. at 662). In other words, whereas the physical characteristics of the large logs in the Restatement example inherently carried a predictable risk *(i.e.,* becoming dislodged and falling off of the truck), the physical characteristics of hot asphalt pose no such risk.

The New Jersey Supreme Court followed *Teichert* in *Mavrikidis v. Petullo,* 707 A.2d 977 (N.J. 1998), a case that also arose from an accident between a car and a truck carrying hot asphalt; the

accident was due to the truck driver's negligence and the defective condition of the brakes (which in turn had been caused by overloading the truck). Indeed, the court held the "inherently dangerous work" exception inapplicable notwithstanding the fact that the hot asphalt had spilled onto the plaintiff after the initial collision, aggravating the plaintiffs injury. *See id.* at 991 ("[a]lthough the consequences of the accident were more severe due to the contents of the truck at the time of the accident, the accident itself did not arise out of any peculiar risk inherent to the transportation of asphalt").[18]

In short, the contents of a truck are relevant only if they pose an increased risk of ***causing*** an accident and such risk was in fact instrumental in the accident. The log-carrying truck in the

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[18] Even when a truck is carrying freight that entails an inherent risk of becoming dislodged or of interfering with the truck's normal operation (such as the logs in the Restatement example), the inherently dangerous work exception applies only when that risk is the actual cause of the accident. Thus, the inherently dangerous work exception does not apply when a truck transporting logs is involved in an accident caused not by the logs becoming dislodged, but rather by some defect in the truck or negligence in its operation. *See Ek v. Herrington*, 939 F.2d 839, 844 (9th Cir. 1991) ("It is undisputed * * * that the overload, combined with the defective brakes, caused the accident. However, there is no evidence that the manner of fastening the logs was inadequate or that it contributed to the accident."); *Williams v. Tenn. River Pulp & Paper Co.*, 442 So. 2d 20, 23 (Ala. 1983) ("Tennessee Paper may be responsible for special precautions to anchor a load of giant trees which constitute a particular risk, but it is not responsible for the independent contractor's compliance with simple maintenance procedures and load factors.").

Restatement example meets that criterion because the physical characteristics of large logs make them susceptible to falling off a moving truck, thereby presenting a direct hazard to other traffic. Another example might be a chemical so corrosive that it could eat through the trailer's walls, spilling onto the roadway. *Cf. Indiana Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1179 (7th Cir. 1990) (suggesting that transport of corrosive chemicals in a rail car would constitute an ultra-hazardous activity exposing carrier to strict liability). By contrast, the asphalt loads in *Teichert* and *Mavrikidis* carried no inherent risk of becoming displaced or somehow interfering with the proper functioning of the truck.

Applying this principle to the facts here, it is evident that the transport of hot mix asphalt does not constitute inherently dangerous work. The fact that the truck was carrying asphalt was purely incidental and not causative of the accident, which undisputedly was due to the blow-out of the bald tire on Galloway's truck. There is no meaningful distinction between the faulty tire in this case and the faulty brakes in *Mavrikidis* or the negligent left-hand turn in *Teichert:* None of these had any relationship to the contents of the truck, and each accident could just as easily have occurred in a truck carrying other freight.

The disputed overweight status of Galloway's truck does not alter this conclusion.[19] As *Mavrikidis*

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[19] We assume *arguendo,* for present purposes only, that the truck's weight was in excess of the lawful limit in West Virginia.

explains, overloading of asphalt has nothing to do with the inherent properties of asphalt: A truck carrying any type of freight could be overloaded. And, although the purported overloading in this case was performed by the defendant (Mountain), rather than by the independent contractor as in *Mavrikidis,* that fact bears (if at all) only on Mountain's ***direct*** liability, not on the applicability of the inherently dangerous work exception to the independent contractor defense to ***vicarious*** liability.

The Circuit Court rejected the authorities Mountain cited because they did not involve the specific activity of "hauling of asphalt 'hot mix' on the roads of West Virginia, not in an empty truck, but in a legally overweight truck, with known bald tires." June 25, 2001 Order at p. 10 (quoting Oct. 26, 2000 Order at p. 14). But exactly the same description (substituting "faulty brakes" for "bald tires") applied in *Mavrikidis* (707 A.2d at 98], 990), yet the court there nevertheless found the exception, and the rationale underlying it, to be inapplicable.

2. The hauling of asphalt by Galloway, even if presenting an "unreasonable risk of harm" for purposes of the public franchise exception, was not the subject of any public franchise held by Mountain.

The public franchise exception applies when "'[a]n individual or corporation carr[ies] on an

activity [1] which can be lawfully earned on only under a franchise granted by public authority and [2] which involves an unreasonable risk of harm to others.'" *Griffith,* 157 W. Va. at 323,201 S.E.2d at 286 (quoting Restatement (Second) of Torts § 428). But while *Griffith* indicates that the second part of the exception is satisfied by asphalt-hauling, the other prerequisite to application of this exception—that the activity be of a type that can lawfully be carried out only under a public franchise—is not established in this case. Simply put, the "activity" in which Mountain is engaged under a public franchise is the actual construction of a highway at the project site (from Midkiff Road to Branchland), not the transportation of asphalt from Mountain's plant to that site.

As an initial matter, the text of Restatement Section 428, quoted in *Griffith,* suggests the importance of properly identifying the activity being performed under public franchise:

> An individual or corporation carrying on ***an activity*** which can be lawfully carried on only under a franchise granted and which involves an unreasonable risk of harm to others, is subject to liability for physical harm caused to such others by the negligence of the contractor employed to do work in carrying on ***the activity***. (Emphasis added.)

Moreover, an examination of the purpose behind this rule confirms that the activity should be

characterized narrowly as the actual construction of the highway, rather than broadly to include all tasks incidental to actual construction. The concern that underlies the rule is that franchisees will attempt to evade the carefully drawn safety regulations that accompany the grant of a public franchise by delegating aspects of the work to unregulated independent contractors and then relying on the general rule of non-liability for the negligence of an independent contractor. *See, e.g., Longo v. Pennsylvania Elec. Co.*, 618 F. Supp. 87, 91 (W.D. Pa. 1985) (to allow delegation by the franchisee would render ineffective the requirements of Pennsylvania's Public Utility Code. A motor carrier operating under a public franchise cannot escape its responsibility to the public by conducting its business through independent contractors"). Thus, the typical fact pattern to which Section 428 applies involves an attempt by a motor carrier who holds a public franchise to delegate a hauling job to a party who does not hold such a franchise. *See generally Williamson v. Southwestern Bell Tel. Co.*, 265 S.W.2d 354, 357 (Mo. 1954) ("The rule as to nondelegable franchise duties is illustrated by the peculiarly applicable instances of common carriers who by lease or contract attempt to delegate to independent contractors their publicly granted franchise duties of transporting freight.")

In this case, by contrast, the independent contractor, Galloway, itself held a public franchise for the specific activity of transporting freight on public roadways—a DOT certificate, the modern-day equivalent of the ICC certificate described in

Griffith as a "franchise" (157 W. Va at 322, 201 S.E.2d at 286). Because Galloway is subject to public safety regulations in connection with that franchise, there was no evasion of those regulations when Mountain retained Galloway to haul the asphalt. Accordingly, the rationale behind the rule does not apply, and Mountain's franchise is appropriately understood as encompassing only the actual construction of the highway. *Cf. Williamson*, 265 S.W.2d at 358 ("The [tree-trimming] work involved here was necessary, preliminarily, to the furnishing of telephone service, and perhaps to continued good service, but it was not the carrying out of the franchise function or duty of operating a telephone company or of furnishing telephone service within the meaning of the exceptional rule preventing the delegation of the work to an independent contractor.").

3. The Circuit Court's exception for a "nondelegable duty imposed by contract" contravenes this Court's precedent.

The Circuit Court's final rationale for depriving Mountain of the independent contractor defense was the existence of a supposed nondelegable duty imposed upon Mountain by the Mountain-DOH contract. Specifically, the Court reasoned that the contract imposed on Mountain a non-delegable duty to protect the safety of the public not only at the project site but also in connection with the transport of asphalt to that site. Oct. 26, 2000 Order at 14-15.

While we strongly contest the Circuit Court's interpretation of the contract (see Point IV, *infra),* that interpretation, even if correct, does not render Mountain vicariously liable here. At the outset, no prior "West Virginia case recognizes a "non-delegable duty imposed by contract" exception to the rule of non-liability for the negligence of an independent contractor. The absence of such case law is hardly surprising given the substantial tension that would be created with the well-established rule in West Virginia that a third-party beneficiary of a contract may assert rights thereunder only if the contracting parties intended the contract to inure to the sole benefit of the third party.

Section 55-8-12 of the West Virginia Code provides in relevant part that a third party to a contract may maintain an action on that contract only where the "covenant or promise be made for the ***sole*** benefit" of that person (emphasis added). This Court recently noted that it has "repeatedly applied this statute and [] consistently given force to the 'sole benefit' requirement" *(Eastern Steel Constr., Inc. v. City of Salem,* 209 W. Va. 392, 403, 549 S.E.2d 266, 277 (2001)), setting a high bar to a claim by a third party that the contracting parties intended the contract to inure to the third party's sole benefit:

> In the absence of a provision in a contract specifically stating that such contract shall inure to the benefit of a third person, there is a presumption that the contracting parties did not so

> intend and in order to overcome such presumption the implication from the contract as a whole and the surrounding circumstances must be so strong as to be tantamount to an express declaration.

Id. at 278 (quoting *Syl.Pt. 2, Ison v. Daniel Crisp Corp.*, 146 W. Va. 786,122 S.E.2d 553 (1961)).

In holding that Mountain had a contractually imposed, non-delegable duty, the Circuit Court relied upon a provision of the Mountain-DOH contract in which Mountain promised "to conform to the laws of the State of West Virginia * * * and to save the department harmless from all liability for damage to persons or property that may accrue during and by reason of acts of negligence of the contractor, his agents, employees or subcontractors if there be such." Oct. 26, 2000 Order at 6 (quoting Mountain-DOH Contract ¶ 4). The court also invoked certain specifications that the contract incorporated by reference, including one stating that Mountain was to "provide all safeguards, safety devices and protective equipment and take any other needed actions * * * reasonabl[y] necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the Contract." *Id.* at 7 (quoting Spec, § 107.7).

Neither these nor any other provisions in the Mountain-DOH contract, however, expressly state that the obligations they impose "shall inure to the

benefit of a third person," and they therefore fail to satisfy the plain statement rule reaffirmed in *Eastern Steel.* Accordingly, it must be presumed that the contracting parties did not intend that the contract should inure to the sole benefit of a third person. And, although the presumption may be rebutted by "strong" circumstantial evidence, *United Dispatch, Inc. v. E.J. Albrecht Co.,* 135 W. Va. 34, 62 S.E.2d 289 (1950)—a case on all fours with this one—holds that the types of provisions upon which the Circuit Court relied do not meet that: criterion.

United Dispatch, like this case, involved a public works contract. The federal government contracted with the defendant to construct a concrete wall and levee that would provide flood protection to the residents of the City of Parkersburg. Just as in this case, the contract contained a "hold harmless" clause. That clause specified: "[The contractor] shall be responsible for all damages to persons that occur as a result of his fault or negligence in connection with the prosecution of the work * * * [and] for all loss or destruction of or damages to property that occurs as a result of his fault or negligence in connection with the prosecution of the work." *Id.* at 36, 62 S.E.2d at 291. Also, like here, the contract in *United Dispatch* contained a clause requiring protection of the public in the performance of the work. That provision stated: "The contractor shall protect all existing structures, utilities and work of any kind against damage or interruption of service which may result from operations of the contractor." *Id.*

As things turned out, the defendant's work caused a flood that damaged the plaintiff's building. The plaintiff brought suit based on the defendant's contract with the federal government, basing his claim on the theory that the above-described provisions were intended to benefit the plaintiff or a class to which the plaintiff belonged, and therefore that plaintiff qualified as a third-party beneficiary under W.Va. Code § 55-8-12. This Court rejected that argument, holding that the contract was not made for the sole benefit of the plaintiff (or a class to which he belonged), and to the contrary "was made for the sole benefit of the ***contracting parties.***" 135 W. Va. at 46, 62 S.E.2d at 296. (emphasis added). The court explained that the contractual provisions cited by the plaintiff "were intended for the benefit and protection of the Government of the United States of America" by relieving it of any potential liability resulting from the work. *Id.* As the Supreme Court of Oregon put it in discussing the holding of *United Dispatch,* these provisions amounted to "a mere indemnity clause." *Larson v. Heintz Constr. Co.,* 345 P.2d 835, 844 (Or. 1959).

The contractual provisions relied upon by the Circuit Court here are indistinguishable from those relied upon by the plaintiff in *United Dispatch.* Under *United Dispatch,* the contractual provisions in this case merely impose upon Mountain a duty to indemnify DOH from any liability (in tort, for example) to which it may be subjected as a result of Mountain's work, and therefore cannot be described as intended "for the ***sole*** benefit" of the public or any member of the public. Accordingly, plaintiffs would be barred by *United Dispatch* from bringing an

action in contract against Mountain based upon the Mountain-DOH contract. And if, as *United Dispatch* holds, a contract like that between Mountain and DOH does not create a duty enforceable by third parties in the case of Mountain's own negligence, it would be wholly incongruous to conclude that it would allow plaintiffs to invoke the Mountain-DOH contract to impose vicarious tort liability upon Mountain for the negligence of its independent contractor.

IV. The Circuit Court Erred in Holding that The Mountain-DOH Contract Unambiguously Imposed Upon Mountain A Duty To Protect Public Safety Beyond The Project Site, and Consequently Erred In Precluding The DOH Official Who Signed The Contract From Testifying That The Contract Imposed a Duty To Protect Public Safety Only At The Project Site.

A. Facts and Background

The key premise of the Circuit Court's holding that Mountain could not assert the independent contractor defense because it had a non-delegable duty to protect public safety at and beyond the project site was that the Mountain-DOH contract unambiguously imposed a duty to protect public safety beyond the project site. As we have argued, see Point III.B.3, *supra,* the Circuit Court's non-delegable duty holding is erroneous whether or not its interpretation of the contract is correct. Still, the scope of a contractor's duty to protect public safety is

an issue of obvious statewide importance to DOH, contractors, and the public, and therefore warrants the attention of this Court. As we now demonstrate, the Circuit Court's interpretation of the contract and preclusion of extrinsic evidence from DOH's drafter was incorrect.

The Circuit Court observed that the Mountain-DOH contract incorporates by reference the West Virginia Department of Transportation, Division of Highways Standards and Specifications, Roads and Bridges ("Specifications"). *See* Order On Declaratory And Summary Judgment dated Oct. 26, 2000, at p. 6 (quoting Mountain-DOH contract, paragraph 4: "Contractor agrees to conform to the laws of the State of West Virginia * * *."). The Circuit Court then turned to the Specifications and held that they unambiguously "impose upon Mountain the non-delegable duty to insure that the work under the Contract was performed in such a manner as to insure the safety of the public." *Id.* at p. 12. Based on this holding, the Circuit Court precluded Robert Tinney, the DOH official who signed the Mountain-DOH contract for DOH, from testifying that he understood the contract and the Specifications to impose upon Mountain a duty to protect the public safety ***only at the project site***. *See* 6/15/01 Trial Tr. at p. 14.

B. Argument

The Circuit Court first erred in holding that the Mountain-DOH contract unambiguously imposed the sweeping duty claimed by plaintiffs. While it is true that the contract incorporates the

Specifications, the Specifications are unquestionably ambiguous as to the extent of the contractor's duty to protect public safety. The Circuit Court quoted the numerous sections of the Specifications that create this ambiguity, but failed to discuss them, instead simply asserting that the Specifications are unambiguous.

"Contract language is considered ambiguous * * * where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken." *Syl. P. 6, State v. Cummings,* 212 W. Va. 275, 569 S.E.2d 796 (2002). The Specifications certainly qualify as ambiguous under this definition. Section 107.7 of the Specifications states (emphasis added):

> The Contractor shall at all times so conduct their work as to assure the least possible obstruction to traffic. The ***safety and convenience of the general public * * * along the highway and the protection of persons and property shall be provided for by the Contractor as specified under 104.5.***
>
> The Contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions, on their own responsibility, or as the Engineer may determine, reasonable [sic] necessary to protect the life and health of employees on the job and the safety of the public

> and to protect property in connection with the performance of the work covered by the Contract * * *.

The emphasized language, as well as the reference to Section 104.5, which concerns control of traffic at the project site, strongly suggests that the Contractor's duty is only to protect public safety at the project site and in the near vicinity, *i.e.*, where traffic passes by the project site. See Exhibit B (Excerpts from Mountain/DOH Contract)

To be sure, the second paragraph quoted above (referring generally to "the safety of the public * * * in connection with the performance of the work covered by the Contract") could be read to impose a somewhat broader duty. But that establishes at most that there is an ambiguity, not, as the Circuit Court held, that the Specifications unambiguously impose upon Mountain a duty to protect public safety miles beyond the project site where the accident occurred.

In light of this ambiguity, the Circuit Court was required to allow extrinsic evidence concerning the scope of Mountain's duty to protect public safety. *See Syl., McShane v. Imperial Towers, Inc.*, 165 W. Va. 94, 267 S.E.2d 196 (1980) ("'[W]here the meaning [of a contract] is uncertain and ambiguous, parol evidence is admissible to show * * * the practical construction given to the contract by the parties themselves either contemporaneously or subsequently.'") (quoting *Syl. Pt. 4, Watson v. Buckannon River Coal Co.*, 95 W. Va. 164, 120 S.E. 390 (1923)). The proffered

testimony of DOH's Tinney is the paradigm of acceptable extrinsic evidence, as he was the DOH official responsible for drafting and executing the contract on DOH's behalf. And Tinney would have testified that neither the contract nor the specifications imposed any duty on Mountain to protect public safety miles away from the project site. 6/6/01 Trial Tr. at pp. 132-34 (quoting deposition). Mountain should be granted a new trial at which to present this testimony.

CONCLUSION

For the foregoing reasons, Mountain requests that the Court grant its Petition for Appeal.

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